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No. 1

In The

Supreme Court of the United States

AURELIO ROSADO; LYDIA ROSADO;
AND THEIR CONJUGAL PARTNERSHIP,

Petitioners,

v.

WACKENHUT INTERNATIONAL, INC.;
WACKENHUT PUERTO RICO, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the Age Discrimination in Employment Act (29 U.S.C. § 623(a)), the Court of Appeals erred in requiring, in addition to sufficient pretext evidence, direct evidence of discriminatory intent.

PARTIES TO THE PROCEEDINGS

Petitioners are Aurelio Rosado, Lydia Rosado and their conjugal partnership.

Respondents are Wackenhut International Inc. and Wackenhut Puerto Rico Inc., a wholly owned subsidiary of Wackenhut International Inc.

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PETITION FOR A WRIT OF CERTIORARI

Counsel for Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, (Pet. App. 1) is not reported. The order of the District Court, (Pet. App. 12) granting summary judgment against Petitioner is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 2005. A timely petition for rehearing was denied on February 6, 2006. Pet. App. 31. The jurisdiction of this Court for this petition of a writ of certiorari rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides, in pertinent part: "It shall be unlawful for an employer . . . to discharge an individual . . . because of such individual's age. . . ."

Federal Rule of Civil Procedure 56 provides, in pertinent part:

> (c) . . . The judgment sought shall be rendered forthwith if the pleadings, the positions,

answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT

This case is likely to clarify and determine the standard of proof required in cases where Petitioners lack direct evidence of discrimination. It is a case that arises in the context of a summary judgment granted by the Court of Appeals for the First Circuit, on the basis that there was no evidence showing age discriminatory animus. It portrays the inconsistent treatment that Circuit Courts have provided to this Court's initial attempt set forth in *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000) to clarify the role of pretext in the evidentiary framework for proving discriminatory intent. The Court of Appeals, along with several Circuit Courts, have misconstrued the *Reeves* holding, directing that evidence of pretext alone may be sufficient to prove discriminatory intent, into a *de facto* pre-*Reeves* regime of pretext-only/pretext-plus forums. In this case the Court of Appeals, acting in sync with its express acknowledgement that its pre-*Reeves* decisions were consistent with said holding (*Feliciano v. El Conquistador*)[1] analyzed the evidence submitted in the scenario of

[1] 218 F.3d 1 (1st Cir. 2000) is a judgment issued six days before *Reeves*. After the *Reeves* opinion was issued, Feliciano petitioned for a rehearing on the basis of inconsistency with the Court's opinion in her case. *Feliciano, Id.* at 9. Her petition was denied given that the June 6 opinion was considered "consistent" with *Reeves*. *Id.* at 10.

summary judgment through its construction of the *Reeves* standard as requiring more than pretext.

Petitioners' opposition to summary disposition and statement of contested material facts in controversy complied with the required burden of proof for both his ADEA and ADA claims. Petitioners satisfied each and every one of the elements for a *prima facie* case of ADEA and ADA as well as his burden of establishing that the Respondents articulated legitimate non-discriminatory reasons for termination are a pretext covering up discrimination. There is sufficient evidence for a reasonable jury to find mendacity in Respondents' explanation for Petitioners' termination which, coupled with his *prima facie* case, provides the required evidence to survive summary judgment.

(i) Aurelio Rosado: Evidence of Age Discrimination

Rosado is a 60-year-old man, citizen of the United States and resident of the Commonwealth of Puerto Rico, married to Co-Petitioner Lydia Rosado. He is a retired police sergeant and an honorably discharged Vietnam veteran who during 1973-76 worked at Wackenhut Puerto Rico (WPR) as its Investigation Division Manager. He left WPR to work in the private investigation industry until 1989, when he was called back by WPR to become its new General Manager. As a General Manager in Puerto Rico, Rosado was responsible for overseeing the company business in the island.

Fernando Carrizosa, (Carrizosa) Wackenhut International (WI) President until around the third quarter of 2001, was Rosado's supervisor. On or about mid-2001, Carrizosa was replaced by William Morrow (Morrow) as

President of WI. In addition to the President, Rosado also reported to WI Vice-President, Fernando Hegel (Hegel).

Throughout his tenure as General Manager, from January 30, 1989 until July 12, 2002 – the date of his termination, Rosado's performance was always satisfactory, competent and in many ways exceeded the company's standards. He received commendations, performance bonuses (including a $46,000 bonus check in 1999 and a $23,000 bonus check in 2000) as well as salary increases during these years.[2] Wackenhut never reprimanded Rosado for his performance nor informed him about any possible deficiencies, which if uncorrected, could lead to his termination.

WPR, like WI, sells security devices and provides diverse security services, including contracting security guards and installing alarm systems. WPR offers services to both the public (governmental agencies) and the private sector in Puerto Rico. WPR General Manager reports directly to the President and Vice-President of Wackenhut International (WI).[3] The WI President is, for all practical purposes, the supervisor of WPR's General Manager and the president of a very informal Board of Directors of WPR.[4] The WI Presidents hire the WPR General Manager, establishes his compensation package and directs the governance of WPR offices in terms of reporting, requiring monthly reports, balance sheets, Profits and Loss statements (P&L) or any other operational report.[5]

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[2] Petitioners' Court of Appeals Appendix at 306-308.

[3] Petitioners' Court of Appeals Appendix at 293.

[4] Petitioners' Court of Appeals Appendix at 293.

[5] Petitioners' Court of Appeals Appendix at 294-295; 298-302.

Notwithstanding Rosados' discretion as general manager, the President of WI has the last word with respect to the budget and the managers' corporate plan.[6] Said President also has the last word about prices and, thus, the manager is prevented from offering lower prices, even when he deems this strategy as the most efficient in the long run.[7]

On April 15, 1998, Rosado suffered a cardiac arrest. He was in recovery, out of his job for forty (40) days. After said period of time Rosado returned to work and continued performing competitively and satisfactorily.[8] As an example, between the years 1998 until the end of 2000, WPR reached a peak in revenues which amounted to $33 million a year.[9] At that time the Company's economic structure was built upon four (4) to five (5) government contracts which, although not leaving a profit, helped the company cover all its obligations, overhead and fixed expenses.[10] This permitted the Company to allocate as profit all of its contracts with the private/non-governmental sector. Rosado was very concerned with the fragile platform that government contracts built for the overall business, given the government's track record of late payments and the temporary nature of such contracts, being subject to the shifting political winds.[11] Consequently, even when WPR was making a yearly $33 million profit, Rosado kept always bringing to Carrizosa and Hegel's attention the

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[6] Petitioners' Court of Appeals Appendix at 297-298; 330-333.

[7] Petitioners' Court of Appeals Appendix at 330-333.

[8] Petitioners' Court of Appeals Appendix at 306; 308-309.

[9] Petitioners' Court of Appeals Appendix at 316; 323.

[10] Petitioners' Court of Appeals Appendix at 279 ¶8; 327.

[11] Petitioners' Court of Appeals Appendix at *Id.*

need to change the business approach.[12] Because of this situation, Rosado even went as far as taking the decision of not bidding for several government agency contracts.[13]

Rosado consistently offered suggestions and recommendations for preventing a critical economic situation and seized the opportunity provided by conversations taking place around his performance evaluation to discuss these issues with Carrizosa and Hegel. Rosado argued that, in order to be competitive, WPR would have a firmer foundation if it moved away from the government contracts while simultaneously lowering the profit expectation for private contracts.[14] However, Carrizosa's and Hegel's responses were always the same: "Rosado, in theory that looks alright but I cannot lower the prices, because headquarters would not allow it."[15] Rosado's hands were tied-up by the fact that WI controlled the pricing for all WPR bids and did not allow him to lower the prices.[16] Carrizosa and Hegel were essentially the ones making the final determination on every bid.[17]

Rosado's predictions regarding government contracts materialized. Between the end of the year 2000 and the beginning of the year 2001, WPR lost all government contracts in bidding processes.[18]

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[12] Petitioners' Court of Appeals Appendix at 327-329.

[13] Petitioners' Court of Appeals Appendix at *Id.*

[14] Petitioners' Court of Appeals Appendix at 279 ¶8; 319-322.

[15] Petitioners' Court of Appeals Appendix at 279-281 ¶11; 321.

[16] Petitioners' Court of Appeals Appendix at 281; 330-331.

[17] Petitioners' Court of Appeals Appendix at 316-317.

[18] Petitioners' Court of Appeals Appendix at 329.

– Rosado's Successor

When Morrow became WI President, Hegel became the point person at WI in charge of the WPR affairs, and the former, learning of the financial losses of WPR during the year 2000-2001, agreed with Hegel's decision to send Griffey, less than 40 years old, to WPR for the scheduled yearly audit[19]. At that point in time Griffey held the position of Field Support Operations for WI. Furthermore, Griffey was asked by Hegel to perform a financial analysis of the situation in Puerto Rico, labeled as a sensitivity report.[20] Griffey had no knowledge of the Puerto Rico operations and the particularities of the Puerto Rican market.

– Griffey's Sensitivity Report

A sensitivity report is an analysis of the specific hours of services the agency needed to sell in order to catch up with the business loss. This entailed reviewing line by line WPR revenues and expenses. Furthermore, during the preparation of this sensitivity report both Hegel and Griffey were constantly providing Carrizosa with information regarding suggestions for improving profits, such as how many hours WPR needed to sell, and how many expenses needed to be reduced.[21]

From the outset Griffey's *modus operandi* disregarded Rosado's input. In fact Griffey never met with Rosado during the four (4) months that it took for the preparation

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[19] Petitioners' Court of Appeals Appendix at 311-312.

[20] Petitioners' Court of Appeals Appendix at *Id.*

[21] Petitioners' Court of Appeals Appendix at *Id.*

of said study,[22] concluded at some point between July and October 2001.

Around this time Hegel prepared an evaluation of Rosado's performance for the year 2000 that was never discussed with him. Apparently, he was waiting for the conclusion of the sensitivity report in order to discuss it with Rosado. However this meeting never took place and there is no explanation or any justification offered for this.[23]

– Rosado's Actions

During the year 2001, Rosado kept explaining to Hegel that WPR had to lower the rates per hour in order to increase revenues and be competitive. For Rosado it was a simple business decision that involved two choices, either you sell at a lower rate in order to recover the lost business or you recover internally to reduce your cost. Furthermore, on several occasions, Rosado wrote to Hegel his concerns and suggestions in order to alleviate the impact of lost government contracts. He never received any response concerning his recommendations.[24]

– The Action Plan: Griffey Takes Over

On or around Friday, February 1st, 2002, Morrow and Hegel met with Rosado in the WPR offices; the first time Rosado personally met Morrow to discuss WPR operations.

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[22] Petitioners' Court of Appeals Appendix at 282; 326.

[23] Petitioners' Court of Appeals Appendix at 311.

[24] Petitioners' Court of Appeals Appendix at 279-281 ¶¶ 8-10; 320-322; 327-328.

The meeting lasted 20-25 minutes.[25] Rosado first learned about Griffey's sensitivity report's conclusions. As a direct result of the sensitivity report, Morrow requested from Rosado a *Puerto Rico Operations Action Plan* and thus gave Rosado "a second chance" notwithstanding the fact that he had been informed, according to corporate officers' testimony, of his incompetence.[26]

Four days later, Rosado suffered a second cardiac arrest which kept him away from his job for fifty-five (55) days.[27]

After Rosado's heart attack, Griffey was assigned to run the PR operation. No one notified Rosado about this appointment.[28] On several occasions, while Rosado was recovering at home, he was contacted by Griffey to discuss several job-related issues, specifically the Action Plan requested by Morrow on February 1st 2002.[29] In said discussions, Rosado disagreed with some of Griffey's ideas and made it clear he disapproved of the latter's proposals. Rosado, not having received any contrary information, believed he still held the General Manager's position. However, Griffey assumed this role and constantly made managerial decisions without Rosado's consent.[30]

The official nature of Rosado's replacement as General Manager took some time to be revealed. On or about April 2002, there were more than a few occasions when Rosado,

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[25] Petitioners' Court of Appeals Appendix at 332.

[26] Petitioners' Court of Appeals Appendix at 331-333.

[27] Petitioners' Court of Appeals Appendix at 11-12; 283-84 ¶17-18.

[28] Petitioners' Court of Appeals Appendix at 11-12; 283 ¶18.

[29] Petitioners' Court of Appeals Appendix at 11-12.

[30] Petitioners' Court of Appeals Appendix at 11-12.

after his return to work, attempted to find out exactly the scope and extent of Griffey's authority and how his position and employment was affected. He discussed the issue with Griffey himself, who claimed that he was not sure of his status in the company.[31] He also discussed the issue with Hegel who either avoided the subject or claimed total ignorance.[32]

After Rosado's return to work, business was run differently. The staff was clearly following Griffey's instructions and work was done when Griffey instructed so.[33] On several occasions employees expressed Rosado their concern, given their uncertainty about Rosado's authority, and thus not knowing how to respond to his requests.[34] In the midst of this situation a Wackenhut colleague from El Salvador asked Rosado a "retirement" question. On or about a month after Rosado's return to work, he received a call from Miguel Angel Escobar, the President of Wackenhut/El Salvador, well connected to VP Hegel, who originally worked at El Salvador's offices. During the conversation Mr. Escobar asked Rosado on several occasions "why don't you retire?" He said that things would probably be easier for everybody if he did. For Rosado this phone call was very unusual, given its personal tone and nature and given the fact that he did not have a previous relationship with Escobar.[35]

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[31] Petitioners' Court of Appeals Appendix at 11-12; 283-84 ¶18.

[32] Petitioners' Court of Appeals Appendix at *Id.*

[33] Petitioners' Court of Appeals Appendix at 12.

[34] Petitioners' Court of Appeals Appendix at 12-13.

[35] Petitioners' Court of Appeals Appendix at 12-13.

Approximately a month after his return, much to his surprise, Rosado learned, by email of a general company report listing company managers, including Griffey as Associate General Manager. (App. at 13) He could not figure out how WPR, during stressful economic times, decided to hire another manager nor the reasons for not informing him of this fact.[36] Notwithstanding said official announcement, Griffey's answer to Rosado's questions was that he was unaware of his position title.[37] Griffey's *curriculum vitae*, however stated otherwise and described him as WPR General Manager since January 2002.[38] This situation remained unaltered until July 12, 2002, the day Rosado was discharged. Hegel and Griffey met with Rosado and informed him both of his termination and that Griffey would replace him as General Manager. **July 12 also was Griffey's 40th birthday.** No specific reason was given for Rosado's termination.[39]

Although Hegel told Rosado he did not know the reasons for his termination, Morrow's testimony states that Hegel participated in the decision to terminate Rosado.[40]

(ii) Wackenhut's Articulation of Reasons for Discharge

Respondents have articulated as legitimate nondiscriminatory reasons that Rosado was terminated due to:

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[36] Petitioners' Court of Appeals Appendix at *Id.*

[37] Petitioners' Court of Appeals Appendix at 11-12; 283-84 ¶18.

[38] Petitioners' Court of Appeals Appendix at 287 ¶7.

[39] Petitioners' Court of Appeals Appendix at 11-13; 283.

[40] Petitioners' Court of Appeals Appendix at 286-87 ¶24.

(1) his performance; (2) his lack of initiative; (3) failure to provide a comprehensive action plan; (4) failure to show signs of improving the critical situation in WPR. The District Court in its Opinion and Order determined that Respondents have met their task. Consequently, the presumption of discrimination created by the *prima facie* case drops away and the burden of production shifts back to Rosado to show that Wackenhut's stated nondiscriminatory reason was a pretext for discrimination.

(iii) Rosado's Evidence of Pretext

The Court of Appeals erred in ignoring Rosado's compliance with the *Reeves* evidentiary framework having presented sufficient pretext evidence of the falseness of Defendants' reasons for his termination, thus allowing it to conclude that Wackenhut unlawfully discriminated.

– The Court of Appeals' Enforcement of a *de facto* Pretext-Plus Standard

The Court of Appeals, in its misconstruction of the *Reeves* standard and in requiring that Rosado "produce evidence beyond the mere assertion that the alleged justification is implausible and show the that the employer's anti-discriminatory animus actually motivated the adverse employment action," held that the record is "devoid of any sign of anti discrimina[illegible] animus toward Rosado."[41] The Court, searching for direct e[illegible]nce, concluded

[41] Petitioners' Court of Appeals Appendix at p 8-9.

that Rosado "fails to cite any material fact in controversy in the record."[12]

The Court missed important considerations in the analysis of discrimination cases, to wit, the significance of assessing the whole picture, proximity in time, and the employer's control of information. These considerations shed light on the ever-elusive question of discriminatory animus/intention. Of particular relevance is the fact that in discrimination cases the events closer in time to the adverse employment action acquire special significance in terms of revealing Respondents' animus, given the nexus and proximity. Furthermore, all the reasons given by the employer for terminating an employee must be truthful, given that the employer is the one in control of the information and of the decision-making processes.

Rosado presented evidence of his last six months of employment against the backdrop of the contradicting events taking place during 2001 in which everyone blamed each other for the loss of government contracts.

Griffey's sensitivity report was being prepared during the last six months of 2001. Wackenhut's corporate officers' deposition testimony assert that Rosado was aware of the sensitivity report and discussed the same with Griffey and Hegel, a fact that Rosado denies. It is admitted by Griffey that Rosado had no input whatsoever on his communications with both Morrow and Hegel regarding said report. Falseness and contradictions in the testimony of Wackenhut's officers reveal the discriminatory animus behind Rosado's replacement by Griffey.

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[12] Petitioners' Court of Appeals Appendix at p 8-9.

On February 2002, Morrow visited the island and gave Rosado "a second chance" notwithstanding the fact that he had been informed, according to corporate officers' testimony, of his incompetence. As a direct result of the sensitivity report, Morrow met with Rosado on February 2002 in his first visit as President, and requested a *Puerto Rico Operations Action Plan*. During that meeting Rosado first learned about Griffey's sensitivity report's conclusions. Rosado argued that it was therefore reasonable to conclude that in asking Rosado for a *Puerto Rico Operations Action Plan* and by stressing the necessity of *righting the ship* before it was too late, Morrow was giving Rosado the opportunity to improve the company's economic situation.

Consequently, in its *de novo* review the Court of Appeals had to determine whether there was sufficient evidence in the record for a trier of fact to conclude that said offer was a real opportunity or just a false gesture in a discriminatory cover-up scheme. The deposition testimonies of Respondents' corporate officers unsuccessfully attempt to state that it was a real chance. Notwithstanding, their actions after the February 2002 meeting and their contradictory testimony support a thick inference of mendacity in the ranks.

Company officers testified that they brought Griffey to Puerto Rico as Assistant General Manager for Puerto Rico operations with two main objectives: (1) prepare a report and recommendation of the Action Plan requested from Rosado and (2) to "hold the fort" and offer support for WPR during Rosado's absence.[43] However, Griffey's *curriculum vitae* reveals that he had been WPR General Manager

[43] Petitioners' Court of Appeals Appendix at 32-35.

since January 2002.[44] Since Griffey's arrival on February 2002 both he and Hegel, avoided Rosado's questions regarding Griffey's position at WPR. Furthermore, Griffey lied to Rosado when he stated that he was uanaware of the position held by him in the Island. Rosado's testimony proves that after Griffey's arrival, he never again exercised the WPR General Manager's authority.

Rosado also presented evidence showing that his alleged failure to submit an Action Plan was also a false justification to cover up Defendant's discriminatory animus. The Action Plan was asked from Rosado right before he suffered the second cardiac arrest that sent him home for more than fifty-five (55) days and, during his convalescent period, he helped Griffey prepare what he thought was the requested Action Plan.

Wackenhut's position that the non-submission of said plan during Rosado's convalescent period amounted to non-compliance with corporate instructions, or lacked of initiative in his part was contradicted by facts showing that during his recovery at home, Rosado helped Griffey prepare what he thought was the requested Action Plan.

A close look at the chronology of events once Rosado returned to work after his convalescent period reveals WI and WPR cover up story regarding Rosado's inaction and his failure to submit an action plan. Only days after Rosado's return, Hegel welcomed him back with an e-mail requesting that the action plan be presented as soon as possible.[45] Rosado immediately sat down with Griffey to

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[44] Petitioners' Court of Appeals Appendix at 287.

[45] Petitioners' Court of Appeals Appendix at 36-37 ¶21.

discuss his action plan (the one to which Rosado offered input during his convalescence period). Although he was not completely convinced about the same, Rosado agreed with it given that, under the circumstances, he had no other options.[46]

Notwithstanding the fact that the action plan was approved by Hegel on May 17th, 2002 and an order for its implementation came from WI,[47] Rosado was terminated two months later because of his lack of initiative and his failure to submit an action plan. Furthermore, on the date of Rosado's termination, Hegel tells Rosado that he doesn't know the reasons for his dismissal, while Morrow testifies in his deposition that Hegel was a co-participant in the decision to dismiss him. Specifically, he testified that he did discuss with Hegel the whole company situation and that both arrived at the conclusion that Rosado had to be terminated.[48]

(iv) Preclusion of Summary Judgment and Inferences for the Jury

This is a case that fully meets the *Reeves* evidentiary standard, one in which the jury should be asked to infer the intentional discrimination from the following: (1) Rosado was a 60-year-old excellent General Manager capable of driving WPR to its peak in sales; (2) At the time of his termination he had no performance problems; (3) A year before his termination a new company president

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[46] Petitioners' Court of Appeals Appendix at 385 ¶22.

[47] Petitioners' Court of Appeals Appendix at *Id.*

[48] Petitioners' Court of Appeals Appendix at 286-87 ¶24.

arrived; (4) Six months after his appointment, said President asked Rosado for the first time for an Action Plan for the WPR operation; (5) After a cardiac arrest and 55 days of recovery Rosado submitted such action plan in conjunction with Griffey; (6) Griffey stripped Rosado from his General Manager's authority after his heart attack; (7) Rosado was terminated from employment because of his failure to submit an action plan and to "right the ship"; (8) Griffey, the person that submitted the Action Plan with Rosado and who had *de facto* authority to right the ship, replaced Rosado in his position as General Manager.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has joined a group of circuits which misconstrue the sufficiency of evidence required to prove discriminatory intent, absent direct evidence. As stated above, these circuits are restoring *the pretext/plus-pretext/only* dichotomy, which preceded the *Reeves* decision, and which followed *St. Mary's Honor v. Hicks,* 509 U.S. 502 (1993). In addition to legitimizing the inconsistent position of plaintiffs in different circuits, the Court of Appeals along with some other circuits, are sapping the vital strength of an evidentiary framework precisely designed to address the difficulties of proving – *via* direct evidence – discriminatory intent. This Court has acknowledged that discrimination can be subtle and that employers have total control of the evidence.

Ever since *Reeves*, the Court of Appeals for the First Circuit (which expressed in *Feliciano v. El Conquistador*

that its pre-*Reeves* *pretext-plus* court-label was unsupported, since *Reeves* involved no significant change to its understanding of the quantum of evidence in these cases)[49] and its companion circuits, have interpreted this Court's holding through the prism of an inverted construction. The Court of Appeals unduly restrains and places at the margins the *Reeves* norm allowing a determination of intentional discrimination from sufficient evidence of pretext. The qualifications and limitations created to underscore its non-absolute character, exemplified by the verb "may permit" became center stage, and an open invitation for requiring discriminatory animus evidence, beyond pretext. (The fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination) *Reeves, supra*, at 511. This reality has signaled a difficult journey for plaintiffs for whom this Court has consistently recognized a distinct evidentiary framework attuned to the realities of employment discrimination.[50] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Often, the *Reeves* qualification/limitation/exception language is used to validate pre-*Reeves* decisions, including those specifically targeted by the *Reeves* court as improperly requiring *pretext-plus*. As the Court of Appeals

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[49] *Feliciano v. El Conquistador, supra* note 1.

[50] Michael J. Zimmer, *Leading by Example: An Holistic Approach to Individual Disparate Treatment Law*, 11 Kan. J.L. & Pub. Pol'y 177, 185 (2001) cited in Brent L. Ryman, *Lame Duck Precedent: a Comment on the Summary Judgement Framework for Disparate Treatment Cases After Reeves v. Sanderson Plumbing*, 71 U. Cin. L. Rev. 669 (2003)

has done in the First Circuit,[51] the Court of Appeals for the Fifth Circuit has underscored that *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989 (5th Cir. 1996), one of the cases that *Reeves* sought to overturn, was consistent with *Reeves. Vadie v. Mississippi State University,* 218 F.3d 365 (5th Cir. 2000).[52]

The Second Circuit, which *de facto* also requires additional direct evidence, has taken a similar path. *Fisher v. Vassar College,* 114 F.3d 1332 (2d Cir. 1997) – another specific case targeted by the *Reeves* court – was expressly held to be consistent with *Reeves. Schnabel v. Gary Abramson,* 232 F.3d 83 (2d Cir. 2000). In stating that the Supreme Court's reading of *Fisher* was inaccurate, the Court of Appeals noted that "the Court did not categorically conclude that a *prima facie* case plus pretext evidence 'permits' a trier of fact to find that a plaintiff has satisfied his ultimate burden" and instead used the language "may permit." In fact the Court went on to state that "if *Reeves* had ended here, we would have little choice but to reinstate plaintiff's ADEA claim in the instant case." By stating the "not always" language sustaining liability, *Reeves* opened the door for a judgment in favor of the employer if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision. *Id.* at 90.

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[51] *Feliciano v. El Conquistador, supra* note 1.

[52] The *Rhodes* language found consistent with *Reeves* stated:

> . . . Thus, a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains.

Excessive reliance on the "additional evidence" of discriminatory comments similar to those present in *Reeves*, creates additional confusing levels. Instead of focusing on the proper standard, the Courts have commonly engaged in a comparative hunt for *the comments*, with the *"coming over on the Mayflower"* and being *"too damn old to do his job"* as the hard act to follow in the *additional evidence* category. In *Vadie, supra*, the Court stated how in *Reeves* the Supreme Court noted substantial evidence by pointing "to comments and conduct of the defendant's supervisor reflecting an age-related animus" (at 374). Due to the absence of similar comments that Court held it was unable to make an inference of intentional discrimination, after the presentation of a *prima facie* case and plaintiff's evidence that the University's asserted legitimate reasons for not hiring him were false, given his superior credentials to the professor hired. The acceptable inference for the Court was instead that the University had an "unidentifiable" reason for not hiring the plaintiff. (*Id.* at 373)

The Court of Appeals in this case and in several post-*Reeves* decisions demonstrated that the confusion generated by *St. Mary's Honor v. Hicks, supra*, remained significantly unaltered. (See also *Weinstock v. Columbia Univ.*, 224 F.3d 33 (2d Cir. 2000); *Cleary v. Nationwide Mut. Ins. Co.*, 2001 U.S. App. LEXIS 11318 (4th Cir. May 31, 2001); *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392 (5th Cir. 2000); *Kulumani v. Blue Cross Blue Shield Ass'n*, 224 F.3d 681 (7th Cir. 2000); *Guyton v. Ottawa Truck Div.*, No. 00-3028 (10th Cir. April 27, 2001)).

Further review is warranted.

I. THE COURT OF APPEALS MISCONSTRUED THE *REEVES* PRECEDENT AND EXACERBATES CIRCUIT CONFLICT, DOCTRINAL INCOHERENCE AND PLAINTIFFS' INCONSISTENT TREATMENT BY SUSTAINING AN INCORRECT APPLICATION OF THE QUANTUM OF EVIDENCE STANDARD

The Court of Appeals did not hold that the pretext evidence presented by Rosado coupled with his *prima facie* case, in the context of a summary judgment, lacked evidentiary sufficiency for proving intentional discrimination. The Court instead analyzed the evidence Rosado presented, through the direct-evidence-requirement/*de facto* pretext-plus lens, and found it either nonexistent or insufficient The Court of Appeals, held that Rosado had to "produce evidence **beyond** the mere assertion that the alleged justification is implausible **and show** that the employer's discriminatory animus actually motivated the adverse employment action". (emphasis added) (only citing *Mesnick v. General Electric,* 950 F.2d 816 (1st Cir. 1991) a pre-*Reeves* decision, emblematic of a pretext-plus standard[53]).

Even under a correct *pretext-only* standard, *Mesnick* presented factual questions concerning the sufficiency of the evidence of pretext itself. An uncontested history of insubordination and well-documented evaluations in that case constituted evidence affecting the quantum and quality of the pretext evidence.

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[53] The Court held: "To be sure, Mesnick flooded the nisi prius roll with plethoric evidence designed to illustrate his professional competence and ability to work well with others – but the vast majority of Mesnick's evidence related to pretext *vel non.* **Regardless of its bulk,** this evidence had nothing at all to do with age or with the employer's true motives". (emphasis added)

– The Value of Circumstantial Evidence

The unanimous voice of this Court correctly understood the nature of circumstantial evidence and the role it plays in the absence of direct evidence when it held that proof of a false explanation "is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive". *Reeves, supra* at 147, citing *St. Mary v. Hicks, supra* at 517 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination" .... Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt.") Citing *Wright v. West,* 505 U.S. 277, 296, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992); and *Wilson v. United States,* 162 U.S. 613, 620-621, 16 S. Ct. 895, 40 L. Ed. 1090 (1896); 2 J. Wigmore, EVIDENCE § 278(2), p. 133 (J. Chadbourn rev. 1979). Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Citing *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration."). *Reeves, supra* at 14.

To undervalue the role of circumstantial evidence through the pretext-plus requirement, improperly and without any statutory basis, places discrimination cases in

a separate category of civil cases with more stringent evidentiary standards, an ironic result, given the Court's reiterated acknowledgement of policy considerations facilitating proof of discrimination.[54] It must similarly be noted that the *pretext-plus* – direct evidence – *de facto* requirement runs counter to the understanding of the applicable *preponderance of evidence* standard, thus imposing the higher burden of *clear and convincing* evidence, *St. Mary's Honor v. Hicks, supra* at 521-23. The risk encountered by a non-credible employer is not different from that awaiting any litigant whose version of the events fails to prevail.[55]

– Accurate Interpretations of *Reeves*

Other Circuits have correctly construed *Reeves* as precluding summary judgment by the probative value of pretext, understanding that the dispute as to the veracity of the employer's explanation "provides evidence as to the company's discriminatory intent . . . " *Ross v. Campbell Soup,* 237 F.3d 701, 708 (6th Cir. 2001). The Ninth Circuit adopts the premise that as a general matter plaintiff "need produce very little evidence in order to overcome an employer's motion for summary judgment." *Chuang v. University of California,* 225 F.3d 1115, 1124 (9th Cir. 2000); (See also *Goosby v. Johnson & Johnson Med Inc.,*

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[54] See also Michael E. Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 Berkeley J. Emp. & Lab. L. 175, 181 (2001), commenting on the rarity of egregious discriminatory comments. Larson, EMPLOYMENT DISCRIMINATION 8.01[1] at 8-7 (2d ed. 1994) ("employers are, on the whole, too sophisticated to profess their prejudices on paper . . . before witnesses").

[55] *Id.* at 374.

228 F.3d 313 (3d Cir. 2000); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 854 (4th Cir. 2001) ("[A] prima facie case and evidence of pretext raises a sufficient inference of discrimination to entitle a plaintiff to survive a motion for summary judgment."); *Toth v. Gates Rubber Co.*, 2000 U.S. App. LEXIS 14374, at 25 (10th Cir. June 21, 2000) (finding contradictory evidence on the issue of pretext was enough to defeat summary judgment); *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1345-46 (11th Cir. 2000) (indirect evidence of pretext was enough to infer intentional discrimination and overcome the defendant's judgment as a matter of law); *Hinson v. Clinch County, Ga. Bd. of Educ.*, 231 F.3d 821, 831-32 (11th Cir. 2000) (overturning summary judgment for school principal who produced believable pretext evidence).

A correct application of the *Reeves* standard in this case would have confirmed that Rosado met his burden of proof. There was no evidence "conclusively" showing that, despite the presence of pretext, some other nondiscriminatory reason was Wackenhut's real motivation, or that Rosado's evidence of pretext was weak. This Court's last word as to the correct evidentiary framework in discrimination cases, underscoring that sufficient evidence of pretext can ultimately prove intentional discrimination, should provide the necessary uniformity and guidance that, without formulaic straight-jackets, employment discrimination law requires.[56]

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[56] As has been suggested, "the overall impact on the law is an inherent unfairness for discrimination plaintiffs. The evidentiary burden depends on which circuit the plaintiff brings his or her case. This fundamental issue of civil procedure should be uniform throughout the federal courts . . . To create uniformity the Supreme Court must

(Continued on following page)

– Further Review as to the Applicability of the *Reeves* Standard in the Summary Judgment Context is Warranted

Justice Ginsburg's statement in her concurring opinion in *Reeves* that, it would be "uncommon" to require additional evidence to the combined *prima facie* and pretext in order to defeat a summary judgment also serves to underscore the improper evidence-weighing process (often involving credibility issues) that some post-*Reeves* decisions have shown. ("I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law. I anticipate that such circumstances will be uncommon.") *Reeves*, at 154.

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once again take up the issue of the evidentiary burden for the plaintiff to defeat a motion for summary judgment in a discrimination case. J. Long, *Advocating Pretext Plus: The Impact of Reeves v Sanderson Plumbing Products Inc. on the Shifting Evidentiary Framework*, 51 U. Kan. L. Rev. 629 (2003); See also Brent L. Ryman, *supra* note 49; McCormick, *Truth or Consequences: Why the Rejection of the Pretext Plus Approach to Employment Discrimination Cases in Reeves v. Sanderson Plumbing Establishes the Better Legal Rule*, 21 N. Ill. U. L. Rev. 355, 374 (2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 05-1325

AURELIO ROSADO, ET AL.,

Plaintiffs-Appellants,

v.

WACKENHUT PUERTO RICO, INC., ET AL.,

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Jose Antonio Fuste, U.S. District Judge]

Before

Lipez, Circuit Judge,
Coffin, Senior Circuit Judge,
Carter,* Senior District Judge,

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* Of the District of Maine, sitting by designation.

Celina Romany, with whom Juan M. Frontera Suau and Celina Romany Law Offices were on brief, for appellants.

José J. Sánchez Vélez, with whom Yldefonso López Morales, Eileen M. García Wirshing and O'Neill & Borges Law Firm were on brief, for appellees.

December 29, 2005

CARTER, Senior District Judge. Plaintiffs/Appellants, Aurelio Rosado, Lydia Rosado, and the conjugal partnership formed between them, filed the present complaint against Defendants/Appellees, Wackenhut Puerto Rico ("WPR") and Wackenhut International, Inc. ("WII") (collectively "the Wackenhut defendants"). Plaintiffs allege violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq. (1994 & Supp.2003); the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131 et seq. (1994 & Supp. 2003); and various Puerto Rico statutes. The district court granted Defendants' Motion for Summary Judgment on all counts of Plaintiffs' Verified Complaint. P[illegible]ntiffs appeal.[1]

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[1] In the interest of clarity, we discuss the case with exclusive reference to appellant Aurelio Rosado. However, this opinion is also binding on appellant Lydia Rosado and the conjugal partnership formed between appellants Aurelio and Lydia Rosado.

I.

Facts and Procedural History

The district court accurately summarized the facts as follows. WII is the parent company of WPR, a subsidiary company dedicated to providing security and surveillance services in the Puerto Rico private and public sectors. Mr. Rosado worked at WPR as general manager from January 31, 1989 until July 12, 2002, when he was terminated. As general manager, Mr. Rosado possessed broad responsibility and discretion for WPR's operations, but his actions were ultimately subject to WII corporate headquarters' approval. Mr. Rosado's responsibilities included submitting monthly operations reports, balance sheets, and profit and loss sheets to the Vice-President of WPR Operations, Fernando Hegel, and the President of WII, William Morrow. Mr. Rosado was subject to periodic performance evaluations, and received yearly bonuses based upon his performance and operational results.

During the first several years of Mr. Rosado's managerial guidance, WPR performed well. At its peak, WPR drew $33 million in revenues. Mr. Rosado received positive evaluations and was rewarded with favorable bonuses. Between 1999 and 2001, WPR lost a significant number of government contracts, and revenue dropped by half. While both parties admit that there was recognition that WPR needed to lessen its reliance on government contracts, which were ephemeral, and to instead redirect sales toward the private sector, the Wackenhut defendants and Mr. Rosado each claim that the other party was unresponsive in joining to remedy the problem.

After the conclusion of a fruitless dialogue between Mr. Rosado and the Wackenhut defendants on righting

WPR's ship, in June 2001, Mr. Morrow and Mr. Hegel directed John Griffey, a WII Field Support Operations Special Project Manager, to visit WPR. Mr. Griffey was directed to draft a sensitivity report assessing WPR's operations and issuing recommendations for improvement, based upon his visit to Puerto Rico. The sensitivity report highlighted the need for improved collections, operational efficiency, and increased sales. In late January or early February 2002, Mr. Morrow and Mr. Hegel met with Mr. Rosado in Puerto Rico to discuss how to improve WPR's grim state of affairs. Mr. Morrow strongly expressed his dissatisfaction with WPR's performance and the need for drastic change, and directed Mr. Rosado to submit a comprehensive action plan by the end of February 2002.

Several days after the meeting took place, Mr. Rosado suffered a cardiac arrest.[2] Mr. Rosado was hospitalized and in recovery for approximately fifty-five days before returning to work. Mr. Rosado was unable to work on the action plan during his recovery. Mr. Morrow and Mr. Hegel directed Mr. Griffey, who had become familiar with WPR's operations during his earlier visit, to return to Puerto Rico, assist in the preparation of the WPR action plan, and provide leadership in Mr. Rosado's absence.

Mr. Rosado returned to work in April 2002, but Mr. Griffey remained at WPR. Mr. Rosado claims that WPR employees were now answering exclusively to Mr. Griffey's command and that although when questioned as to his formal role Mr. Griffey was purposefully ambiguous, Mr. Griffey had become WPR's de-facto general manager. Mr.

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[2] This was Mr. Rosado's second heart attack. His first heart attack took place in April 1998.

Rosado claims that while he retained his formal title as general manager, he had lost all authority at WPR.

Shortly after Mr. Rosado returned, Mr. Hegel requested that he review Mr. Griffey's action plan and either approve Mr. Griffey's plan or, in the alternative, submit his own action plan. Mr. Rosado reviewed and, with some reservations, adopted Mr. Griffey's action plan.

In or around May 2002, Miguel Angel Escobar, the President of Wackenhut El Salvador ("WES"), placed a telephone call to Mr. Rosado.[3] During the conversation, Mr. Escobar asked Mr. Rosado, "Why don't you retire?" Mr. Escobar suggested that "things would probably be easier for everyone" if Mr. Rosado retired.

Approximately one month later, Mr. Morrow made the decision to terminate Mr. Rosado. On July 12, 2002, Mr. Hegel informed Mr. Rosado that he was terminated. Upon Mr. Hegel's recommendations, Mr. Morrow appointed Mr. Griffey as the new general manager for WPR.

Mr. Rosado filed the instant action alleging violations of the ADEA, the ADA and various Puerto Rico statutes. The district court granted the Wackenhut defendants' Motion for Summary Judgment on all counts of Mr. Rosado's Verified Complaint.

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[3] Like WPR, WES is a subsidiary of WII. WES's leadership has no authority over WPR.

II.

Summary Judgment Standard

The standard for summary judgment is straightforward and well-established. A district court may enter summary judgment upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We review summary judgment rulings de novo, construing the record evidence in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party. *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 33 (1st Cir. 2001); *Feliciano de la Cruz v. El Conquistador Resort & Country Club*, 218 F.3d 1, 5 (1st Cir. 2000). Summary judgment is appropriate when "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). "Even in employment discrimination cases where elusive concepts such as motive or intent are at issue," summary judgment is appropriate if the non-moving party rests "merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Feliciano*, 218 F.3d at 5 (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir.1990)) (internal quotations omitted). It is within this procedural framework that we assess Mr. Rosado's claims. Our review is not constrained by the lower court's stated rationale; we may affirm the entry of summary judgment on any ground supported by the record. *See Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d at 178, 184 (1st Cir. 1999).

The ADEA Claim

The ADEA makes it unlawful for an employer to discharge any individual or otherwise discriminate against

him on the basis of his age. *See* 29 U.S.C. § 623(a)(1). Since there is no direct evidence which demonstrates the Wackenhut defendants' alleged discriminatory animus against Mr. Rosado, we must consider the multi-part *McDonnell Douglas* test. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-805 (1973). Applying the *McDonnell Douglas* framework, Mr. Rosado must first "demonstrate that he (1) was at least forty years of age, (2) met the employer's legitimate job performance expectations, (3) experienced adverse employment action; and (4) was replaced by a person with roughly equivalent job qualifications." *Goldman v. First Nat'l Bank of Boston,* 985 F.2d 1113, 1117 (1st Cir. 1993). The record supports the conclusion that Mr. Rosado satisfies the *prima facie* case factors. The burden of production then shifts back to the employer who must rebut the inference of discrimination by articulating some legitimate, non-discriminatory reason for the adverse employment action. *Dominguez-Cruz v. Suttle Caribe, Inc.,* 202 F.3d 424, 430 (1st Cir. 2000). Mr. Rosado admits, and this Court finds, that the Wackenhut defendants have satisfied their burden of production by asserting that Mr. Rosado was discharged because his managerial performance since 1998 was unsatisfactory and because WPR was suffering a lack of effective leadership.

In the final stage of the analysis the burden shifts back to Mr. Rosado to show that the employer's alleged justification was not its true reason for the adverse employment action, but was a mere pretext for age discrimination. *Id.*; *Mesnick v. Gen. Elec. Co.,* 950 F.2d 816, 823 (1st Cir. 1991). The ADEA "does not stop a company from discharging an employee for any reason (fair or unfair) or for no reason, so long as the decision to fire does not stem from the person's age." *Freeman v. Package Mach. Co.,* 865

F.2d 1331, 1341 (1st Cir. 1988). Mr. Rosado must produce evidence beyond the mere assertion that the alleged justification is implausible and show that the employer's discriminatory animus actually motivated the adverse employment action. *See Mesnick,* 950 F.2d at 825.

The record is devoid of any sign that anyone in a decision-making role, including Mr. Morrow and Mr. Hegel, bore any discriminatory animus toward Mr. Rosado. Appellant fails to present evidence necessary to show that the Wackenhut defendants' given reasons for the termination were pretextual. Appellant makes sweeping statements but fails to cite to any material fact in controversy in the record. Although appellant states that "the district court has completely ignored most, if not all, of Plaintiff's pretext evidence," he never discloses what evidence the district court disregarded. Appellant's Brief at 21. Generally, appellant criticizes the district court for missing important considerations such as "the significance of assessing the whole picture, proximity in time, and the employer's control of information." Appellant's Brief at 22. But, here again, he never states what is that pertinent evidence.

Even if we were to consider appellant's unsupported arguments, the evidence fails to create a trial-worthy age discrimination claim. Appellant states that according to Wackenhut corporate officers Mr. Rosado was aware that a sensitivity report was being prepared but Mr. Rosado denies that he knew the reasons for Mr. Griffey's visit to the island. Assuming that there is contradictory testimony on this point, such conflict does not support the inference that the reason given by the Wackenhut defendants for Mr. Rosado's termination was a pretext for age discrimination. Appellant also attempts to draw some inference of

pretext from the February 2002 meeting between Mr. Morrow and Mr. Rosado wherein Morrow discussed the sensitivity report's conclusions with Mr. Rosado, which were apparently unknown to Rosado until that time. However, the fact that Mr. Rosado was kept out of the loop on the sensitivity report does not in any way suggest that the Wackenhut defendants' performance-based reasons for terminating Mr. Rosado were false.

Finally, appellant suggests that when Mr. Morrow asked him to create an action plan for WPR, Mr. Morrow was giving Mr. Rosado an opportunity to improve the company's economic situation. Because he was terminated less than three months after returning to work from the heart attack, appellant suggests that there is sufficient evidence in the record for a trier of fact to conclude that the chance Mr. Morrow gave him was just a false gesture in a discriminatory cover-up scheme. However, the timing of his termination, standing alone or even in conjunction with being kept out of the loop on the sensitivity report, does not in any way suggest that the Wackenhut defendants' performance-based reasons for terminating Mr. Rosado were false. Appellant has not presented any evidence besides his age and Mr. Griffey's presence pointing to age as a factor in his termination. Moreover, appellant has made no attempt to demonstrate that WPR's economic losses under Mr. Rosado's leadership were fabricated by the company to conceal his superiors' discriminatory motives.

The ADA Claim

To establish a claim of disability discrimination under the ADA, a plaintiff must prove, by a preponderance of

evidence, that he (1) was disabled within the meaning of the ADA, (2) was able to perform the essential functions of the job with or without reasonable accommodation, and (3) was discharged by the employer in whole or in part because of his disability. *Jacques v. Clean-Up Group,* 96 F.3d 506, 511 (1st Cir. 1996). Appellant does not allege any direct evidence of disability discrimination. Here again, in the absence of direct evidence, Mr. Rosado may "indirectly" prove his case by "using the *prima facie* case and burden shifting methods originated in *McDonnell Douglas.*" *Jacques,* 96 F.3d at 511 (quoting *Katz v. City Metal Co.,* 87 F.3d 26, 30 n.2 (1st Cir. 1996)).

Under *McDonnell Douglas* Mr. Rosado must demonstrate by a preponderance of evidence that he (1) has a disability within the meaning of the ADA, (2) is qualified to perform the essential functions of the job, with or without reasonable accommodations, (3) was subject to an adverse employment action by a company subject to the ADA, (4) was replaced by a non-disabled person or treated less favorably than non-disabled employees, and (5) suffered damages as a result. *Id.* The district court granted defendants' motion for summary judgment after finding that Mr. Rosado failed to establish a *prima facie* case under the ADA.

Appellant correctly asserts that it is not necessary that he actually be disabled, but that it is sufficient that his employer regarded him as disabled. Considering this theory of liability, the district court found that Mr. Rosado's assertion that he "must have been generally perceived as impaired because of his shortness of breath" was not supported by the record. On appeal Mr. Rosado again contends that the Wackenhut defendants terminated him because he was perceived as being "an old man who had suffered a second heart attack which prevented

him from performing the task required from a manager in the industry." Appellant's Brief at 34. To support this statement, appellant states that anyone observing him after he returned would have noticed physical changes that would have led them to conclude that he was disabled or could not do the job. However, appellant does not cite to any evidence in the summary judgment record that even upon noticing his shortness of breath, anyone entertained the belief that he was disabled. Without providing evidence of a single instance of misperception by any particular person or group of persons, Mr. Rosado can not satisfy his *prima facie* burden under the ADA.

Although appellant suggests that after he returned to work he was universally treated as if he was completely incapable of performing the duties of general manager, his only support for this conclusion is that he was required to have Mr. Griffey authorize his decisions before they became final. Mr. Rosado makes no citation to the evidentiary record to support the assertion that his decisions had to receive prior authorization from Mr. Griffey. However, even if Mr. Griffey was exercising oversight over Mr. Rosado's decisionmaking at WPR, there is no evidence that this is related to a perception by the Wackenhut defendants that Mr. Rosado is disabled rather than to the troubled financial condition of WPR and the corporate effort to implement the action plan, which Mr. Griffey was instrumental in developing. Without record support for the inference that the alleged oversight was in some way connected to Mr. Rosado's shortness of breath, Mr. Rosado can not establish a *prima facie* case under the ADA.

The district court's judgment is *affirmed.*

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

AURELIO ROSADO, et al. Plaintiffs, v. WACKENHUT PUERTO RICO, INC.; et al. Defendants.	Civil No. 03-1737 (JAF)

OPINION AND ORDER

Plaintiffs, Aurelio Rosado, Lydia Rosado, and the conjugal partnership formed between them, filed the present complaint against Defendants, Wackenhut Puerto Rico ("Defendant WPR") and Wackenhut International, Inc. ("Defendant WII").[1] Plaintiff alleges violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1994 & Supp. 2003); the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12165 (1994 & Supp. 2003), and various Puerto Rico statutes. *Docket Document No. 1.*

Defendants move for summary judgment, claiming that Plaintiff cannot meet his burdens under the ADEA and the ADA. *Docket Document No. 15.* In the alternative, Defendant WII requests dismissal under Federal Rule of Civil Procedure 12(b)(6). *Id.* Plaintiff opposes the motion. *Docket Document No. 28.*

[1] In the interest of clarity, we will discuss the case with exclusive reference to Plaintiff Aurelio Rosado. However, this opinion and order is also binding on Plaintiff Lydia Rosado and the conjugal partnership formed between Plaintiffs Aurelio and Lydia Rosado.

I.

Factual and Procedural Synopsis

Unless otherwise indicated, we derive the following factual summary from the parties' statements of facts. *Docket Document Nos. 1, 16, 28.*

WII is the parent company of WPR, a subsidiary company dedicated to providing security and surveillance services in the Puerto Rico private and public sectors. Plaintiff worked at WPR as General Manager from January 31, 1989, until July 12, 2002, when he was terminated. As General Manager, Plaintiff possessed broad responsibility and discretion for WPR's operations, but his actions were ultimately subject to WII corporate headquarters' approval. Plaintiff's responsibilities included submitting monthly operations reports, balance sheets, and profit and loss sheets to the Vice President of WPR Operations, Mr. Fernando Hegel, and the President of WII, Mr. William Morrow. Plaintiff was subject to periodic performance evaluations, and received yearly bonuses based upon his performance and operational results.

During the first several years of Plaintiff's managerial guidance, WPR performed well. At its peak, WPR drew $33 million in revenues. Plaintiff received positive evaluations and was awarded with favorable bonuses. Between 1999 and 2001, WPR lost a significant number of government contracts, and revenue dropped by half. While both parties admit that there was a recognition that WPR needed to lessen its reliance on government contracts, which were ephemeral and unrewarding, and to instead redirect sales toward the private sector, Defendants and Plaintiff each claim that the other party was unresponsive in joining to remedy the problem.

After the conclusion of a fruitless dialogue between Plaintiff and Defendants on righting WPR's ship, in June 2001, Mr. Morrow and Mr. Hegel directed John Griffey, a WII Field Support Operations Special Project Manager, to visit WPR. Mr. Griffey was directed to draft a sensitivity report assessing WPR's operations and issuing recommendations for improvement, based upon his visit to Puerto Rico. The sensitivity report highlighted the need for improved collections, operational efficiency, and increased sales. In late January or early February 2002, Mr. Morrow and Mr. Hegel met with Plaintiff in Puerto Rico to discuss how to improve WPR's grim state of affairs. Mr. Morrow strongly expressed his dissatisfaction with WPR's performance and the need for drastic change, and directed Plaintiff to submit a comprehensive action plan by the end of February 2002.

Several days after the meeting took place, Plaintiff suffered a cardiac arrest.[2] Plaintiff was hospitalized and in recovery for approximately fifty-five days before returning to work. Plaintiff was unable to work on the action plan during his recovery. Mr. Morrow and Mr. Hegel directed Mr. Griffey, who had become familiar with WPR's operations during his earlier visit, to return to Puerto Rico, assist in the preparation of the WPR action plan, and provide leadership in Plaintiff's absence.

Plaintiff returned to work in April 2002, but Mr. Griffey remained at WPR. Plaintiff claims that WPR employees were now answering exclusively to Mr. Griffey's command and that although when questioned as to his

[2] This was Plaintiff's second heart attack. His first heart attack took place on April 15, 1998.

formal role Mr. Griffey was purposefully ambiguous, Mr. Griffey had become WPR's de-facto general manager. Plaintiff claims that while he retained his formal title as general manager, he had lost all authority at WPR.

Mr. Hegel requested that Plaintiff review Mr. Griffey's action plan and either approve Mr. Griffey's plan or, in the alternative, submit his own action plan. Plaintiff reviewed and, with some reservations, adopted Mr. Griffey's action plan.

In or around May 2002, Mr. Miguel Angel Escobar, the President of Wackenhut El Salvador ("WES"), placed a telephone call to Plaintiff.[3] During the conversation, Mr. Escobar asked Plaintiff, "why don't you retire?" Mr. Escobar suggested that "things would probably be easier for everyone" if Plaintiff retired.

Mr. Morrow made the decision to terminate Plaintiff. On July 12, 2002, Mr. Hegel informed Plaintiff that he was terminated. Upon Mr. Hegel's recommendation, Mr. Morrow appointed Mr. Griffey as the new general manager for WPR.

On July 3, 2003, Plaintiff filed the present action. *Docket Document No. 1.* On June 28, 2004, Defendants filed a motion for summary judgment or, in the alternative, dismissal of the claim against WII for failure to state a claim upon which relief can be granted. *Docket Document No. 15.* On August 11, 2004, Plaintiff filed a response in opposition to Defendants' motion for summary judgment and dismissal. *Docket Document No. 40.*

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[3] Like WPR, WES is a subsidiary of WII. WES's leadership has no authority over WPR.

II.

Motion for Summary Judgment Standard under Rule 56(c)

The standard for summary judgment is straightforward and well-established. A district court should grant a motion for summary judgment "if the pleadings, depositions, and answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgement as a matter of law." FED. R. CIV. P. 56(c); *see Lipsett v. Univ. of P.R.*, 864 F.2d 881, 894 (1st Cir. 1988). A factual dispute is "material" if it "might affect the outcome of the suit under the governing law," and "genuine" if the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The burden of establishing the nonexistence of a genuine issue as to a material fact is on the moving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). This burden has two components: (1) an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and (2) an ultimate burden of persuasion, which always remains on the moving party. *See id.* In other words, "[t]he party moving for summary judgement, bears the initial burden of demonstrating that there are no genuine issues of material fact for trial." *Hinchey v. NYNEX Corp.*, 144 F.3d 134, 140 (1st Cir. 1998). This burden "may be discharged by showing that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. After such a showing, the "burden shifts to the nonmoving party, with respect to each issue on which he has the burden of proof, to demonstrate that a trier of fact reasonably could find in

his favor ." *DeNovellis v. Shalala,* 124 F.3d 298, 306 (1st Cir. 1997) (citing *Celotex,* 477 U.S. at 322-25).

Although the ultimate burden of persuasion remains on the moving party and the court should draw all reasonable inferences in favor of the nonmoving party, the nonmoving party will not defeat a properly supported motion for summary judgment by merely underscoring the "existence of some alleged factual dispute between the parties;" the requirement is that there be a genuine issue of material fact. *Anderson,* 477 U.S. at 247-48; *Goldman v. First Nat'l Bank of Boston,* 985 F. 2d 1113, 1116 (1st Cir. 1993). In addition, "factual disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 477 U.S. at 248. Under Rule 56(e) of the Federal Rules of Civil Procedure, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *see also Anderson,* 477 U.S. at 256. Summary judgment exists to "pierce the boilerplate of the pleadings," *Wynne v. Tufts Univ. Sch. of Med.,* 976 F.2d 791, 794 (1st Cir. 1992), and "determine whether a trial actually is necessary." *Vega-Rodriguez v. P.R. Tel. Co.,* 110 F.3d 174, 178 (1st Cir. 1997).

III.

Analysis

Defendants argue that we should grant summary judgment because the facts alleged by Plaintiff are insufficient, as a matter of law, to support an ADEA and/or ADA claim for relief. Defendants also argue that the claim against WII should be dismissed under Rule 12(b)(6) because WII, as a parent corporation, "does not control the

employment practices and decisions of WPR, [and therefore] should not be held liable for the alleged acts of its subsidiary." *Docket Document No. 15.* Because we find that Plaintiff's allegations are insufficient to establish an ADEA or ADA claim, we need not reach the Rule 12(b)(6) issue.[4]

A. ADA Claim

1. Absence of Direct Evidence

To establish a claim of disability discrimination under the ADA, a plaintiff must prove, by a preponderance of the evidence, that he (1) was disabled within the meaning of the ADA, (2) was able to perform the essential functions of the job with or without reasonable accommodation, and (3) was discharged by the employer in whole or in part because of his disability. *Jacques v. Clean-Up Group,* 96 F.3d 506, 511 (1st Cir. 1996). Plaintiff fails to submit any allegations that can be construed as direct evidence that he was discharged because of a disability. In the pleadings, Plaintiff addresses only the first and second prongs of the direct evidence test, and fails to allege direct evidence of discriminatory discharge. *Docket Document Nos. 1, 27.* Plaintiff states only that "a reasonable jury could conclude, from the evidence in the record, and from the reasons given by Defendants for Plaintiff's termination, that Defendant acted because [Plaintiff] was an old man who had suffered a second heart attack which prevented him from performing the task required from a manager in

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[4] Since we do not consider the motion to dismiss, we also do not reach the concerns articulated in Plaintiffs' motion requesting order to strike Defendants' memorandum. *Docket Document No. 19.*

the industry." *Docket Document No. 27.* This declaration is grossly insufficient to constitute direct evidence of disability discrimination. *Anderson,* 477 U.S. at 247-248, 256; *Medina-Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir. 1990).

2. Burden-shifting Framework

In the absence of direct evidence, a plaintiff may also "indirectly" prove his or her case by "using the prima facie case and burden shifting methods that originated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)." *Jacques,* 96 F.3d at 511 (quoting *Katz v. City Metal Co.,* 87 F.3d 26, 30 n.2 (1st Cir. 1996)). A plaintiff may proceed under *McDonnell* by demonstrating by a preponderance of the evidence that he (1) has a disability within the meaning of the ADA, (2) is qualified to perform the essential functions of the job, with or without reasonable accommodations, (3) was subject to an adverse employment action by a company subject to the ADA, (4) was replaced by a non-disabled person or treated less favorably than non-disabled employees, and (5) suffered damages as a result. *Id.*; *Jacques,* supra; *Katz,* supra.

The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desired." 42 U.S.C. § 12111(8). A "disability" is (i) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (ii) a record of such an impairment; or (iii) being regarded as having such an impairment. 42 U.S.C. § 12102(2). Merely having a physical impairment does not make an

individual disabled for purposes of the ADA. *Toyota Motor Mfg., Ky. v. Williams,* 534 U.S. 184, 195 (2002). A claimant also needs to prove that the impairment limits a major life activity. *Id.* A relevant illustration of a "major life activity" is "performing manual tasks." *Id.* To be substantially limited in performing manual tasks, an individual "must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Id.* at 198. Manual tasks that are unique to any particular job are not of necessity important parts of most people's lives. *Id.* at 201. Ultimately, "[w]hether a person has a disability under the ADA is an individualized inquiry." *Sutton v. United Air Lines,* 527 U.S. 471, 483 (1999).

Defendants submit that Plaintiff has "failed to demonstrate that his heart condition poses any impairment or substantial limitation in his ability to perform any major life activities." *Docket Document No. 15.* Defendants are correct to focus on the degree to which Plaintiff was impaired (if at all) rather than the heart condition itself. "A medical diagnosis is insufficient to prove that an impairment is substantially limiting a major life activity; plaintiffs must present 'evidence that the extent of the limitation [caused by the impairment] in terms of their own experience is substantial.' . . . The inability to perform tasks such as washing cars, taking care of the back yard, playing with children, and driving long distances does not amount to such severe restrictions to qualify as major life activities." *Soler v. Tyco Elec., Inc.,* 268 F. Supp.2d 97, 105 (D.P.R. 1997) (quoting *Williams,* 534 U.S. at 197-98, 202). "[T]he EEOC has defined 'major life activities' to include 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing,

learning, and working.'" *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 21 (1st Cir. 2002) (quoting 29 C.F.R. § 1630.2(i) (1991)).

Plaintiff asserts that subsequent to his second heart attack, he experienced chronic shortness of breath, implicitly arguing that his breathing difficulty "substantially limit[ed]" a life activity within the ADA's statutory meaning. *Docket Document No. 27*; *Gillen*, 283 F.3d at 21. Plaintiff supports his claim by referring to Dr. Ricardo Miranda Rodriguez' deposition, in which Dr. Rodriguez described Plaintiff's condition as "mild respiratory distress." *Docket Document No. 27, Exh. 1.* Dr. Rodriguez noted that Plaintiff's condition was not so severe as to be described as "laboring while breathing," and even agreed that it would be difficult to attribute the breathing shortness to Plaintiff's recent heart attack, as opposed to a pulmonary condition common among chronic smokers. *Id.*

Plaintiff's impairment claim, even if assumed as true, fails to impress this court as obviously sufficient for the purposes of establishing an ADA prima facie case. Plaintiff makes no assertion that the mild breath shortness "significantly restricted as to the condition, manner or duration under which [Plaintiff could] perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." *Gillen*, supra (citing 29 C.F.R. § 1630.2(j)). In inquiring into whether Plaintiff was substantially limited, we search in vain for any "significant obstacles." *Gillen*, 283 F.3d at 22. Plaintiff's assertion that he could not walk "without having to take several stops to catch his breath," *Docket Document No. 27*, is insufficient insofar as it establishes an impairment that interferes "in only a minor way with

the performance of manual tasks." *Williams,* 534 U.S. at 197. Additionally, Plaintiff fails to assert the condition's permanence, which is necessary to support a disability claim. *Id.*; *Katz,* 87 F.3d at 30.

Plaintiff correctly observes that the mere perception of impairment can be sufficient for the purpose of satisfying the ADA disability definition. *Docket Document No. 27,* 42 U.S.C. § 12102(2)(C). In order for Plaintiff to obtain redress under § 12102(2)(C), "it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Sutton,* 527 U.S. at 490. While Plaintiff quotes extended passages from *Sutton* and from § 12102(2)(C), Plaintiff does not allege that anyone entertained a mistaken belief that he was impaired. Rather, Plaintiff merely asserts that he must have been generally perceived as impaired because of his shortness of breath. *Docket Document No. 27.* Without pleading a single instance of misperception by any particular person or group of persons, Plaintiff will not satisfy his prima facie burden via reference to 42 U.S.C. §12102(2)(C). *Sutton,* 527 U.S. at 490; *Santiago Clemente v. Executive Airlines, Inc.,* 213 F.3d 25, 30 (1st Cir. 2000); FED. R. CIV. P. 56(e) (the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial").

Because Plaintiff has failed to clearly establish a disability, he has not successfully established a prima facie case of discrimination, and we will not proceed with the

McDonnell burden-shifting analysis of Plaintiff's ADA claim.

B. ADEA Claim

1. Absence of Direct Evidence

The ADEA makes it unlawful for an employer to discharge any individual or otherwise discriminate against him on the basis of her age. 29 U.S.C. § 623(a) (1). Here, there is no direct evidence or "smoking gun" which demonstrates Defendants' alleged discriminatory animus against Plaintiff. Plaintiff's allegation that WES President Escobar brought up the issue of retirement is not probative. *Santiago v. Canon U.S.A., Inc.,* 138 F.3d 1, 6 n.8 (1st Cir. 1998) Plaintiff has not alleged, let alone shown, how the one allegedly discriminatory statement made by an official of another WII subsidiary company was "made by a decisionmaker, pertained to the decisional process, bore squarely on the employment decisions at issue . . . and straightforwardly conveyed age animus." *Febres v. Challenger Caribbean Corp.,* 214 F.3d 57, 61 (1st Cir. 2000). We must, therefore, consider the multi-factor test established by the Supreme Court in *McDonnell Douglas.*

2. Burden-shifting Framework

Plaintiff "must demonstrate that he (1) was at least forty years of age, (2) met the employer's legitimate job performance expectations, (3) experienced adverse employment action, and (4) was replaced by a person with roughly equivalent job qualifications." *Goldman,* 985 F.2d at 1113; *see also Suarez v. Pueblo Int'l, Inc.,* 229 F.3d 49, 53 (1st Cir. 2000); *Febres v. Challenger Caribbean Corp.,* 214 F.3d 57, 61 (1st Cir. 2000). Once the plaintiff establishes a

prima facie case, the presumption arises that the employer unlawfully discriminated against him. *Gonzalez v. El Dia, Inc.*, 304 F.3d 63, 68-69 (1st Cir. 2002); *Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 478 (1st Cir. 1993). The burden of production then shifts back to the employer-defendant who must rebut the inference of discrimination by articulating some legitimate, non-discriminatory reason for the adverse employment action. *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 430 (1st Cir. 2000).

If the employer meets this burden, the inference of unlawful discrimination is dispelled, and the burden shifts to the plaintiff to show that the employer's alleged justification is a mere pretext for discrimination. *Id.*; *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 823 (1st Cir. 1991). At this stage, the plaintiff must produce evidence beyond the mere assertion that the alleged justification is implausible and show that the employer's discriminatory animus actually motivated the adverse employment action. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993); *Mesnick*, 950 F.2d at 825. Throughout this analysis, the plaintiff must prove that he would not have suffered the adverse employment action but for his membership in a protected class. *See Freeman v. Package Mach.*, 865 F. 2d 1331, 1335 (1st Cir. 1988). Thus, federal law "does not stop a company from discharging an employee for any reason (fair or unfair) or for no reason, so long as the decision to fire does not stem from the person's age." *Id.* at 1341.

a. Plaintiff's Prima Facie Case

Plaintiff was over forty years old at the time of an adverse employment action, and was replaced by another employee. *Docket Document No. 28.* The only remaining

prima facie inquiry is whether Plaintiff was qualified to perform the essential functions of the job. *See Texas Dept. of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981); *Calero-Cerezo v. U.S. Dept. of Justice,* 355 F.3d 6, 22 (1st Cir. 2004). Plaintiff points to years of favorable performance reviews and generous bonuses to demonstrate that he was amply qualified to perform. *Docket Documents No. 27, 28.* Defendant maintains that the last several years of Plaintiffs' employment was disappointing, *Docket Document No. 15,* but Plaintiffs' assertions will suffice for the purpose of satisfying the prima facie burden. *Burdine,* 450 U.S. at 253.

b. Defendants' Rebuttal

Defendants are now pressed to rebut the inference of discrimination by articulating some legitimate, non-discriminatory reason for the adverse employment action. *See Dominguez-Cruz,* 202 F.3d at 430. "This burden is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Prod., Inc.,* 530 U.S. 133, 142 (2000) (quoting *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 509 (1993)). As Plaintiff readily concedes, *Docket Document No. 27,* Defendants easily satisfy their burden requirements by asserting that Plaintiff was discharged because his managerial performance since 1998 was unsatisfactory, and because WPR was suffering a lack of effective leadership. *Docket Document No. 15.* The record is so colored with evidence of WPR's troubled financial health, and with WII President Morrow's growing impatience with WPR's lackluster performance, that Defendants' rebuttal hardly requires further discussion. *Docket Document Nos. 1, 15, 16, 27, 28.* Mr. Morrow and Mr. Hegel's concern prompted the commission

of Mr. Griffey's sensitivity report in late summer 2001. Plaintiff admits of his "tense" interactions with Mr. Morrow, and even admits that immediately prior to the heart attack which supposedly supports Plaintiff's ADA claim, he was subject to "scolding" and the "threat" that WPR would be shut down if he did not succeed in righting WPR's ship. *Docket Document No. 27.* Plaintiff may be justified in disagreeing with Defendants' displeasure with Plaintiff's managerial performance; our function is not to sit as a "super-personnel department that reexamines an entity's business decisions." *See Gonzalez,* 304 F.3d at 69 (citing *Mechnig v. Sears, Roebuck & Co.,* 864 F.2d 1359, 1365 (7th Cir. 1988)). Defendants' growing dissatisfaction with Plaintiff's work performance, both before and after the heart attack, clearly serve to satisfy Defendants' *McDonnell* burden.

c. Defendant's Justification as a Pretext

"'[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' And in attempting to satisfy this burden, the plaintiff – once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision – must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Reeves,* 530 U.S. at 143 (quoting *Burdine,* 450 U.S. at 253). Plaintiff adduces no evidence to support the claim that Defendants' reasons for terminating Plaintiff were pretextual. Instead, Plaintiff merely reiterates the sequence of events leading to his termination and labels Defendants'

narrative as contradictory. *Docket Document No. 27.* Plaintiff also argues that his attempts at saving WPR were frustrated by WII leadership's lack of responsiveness, and that he was unjustly blamed for matters beyond his control. *Id.* Plaintiff's concern that he was a scapegoat for the company's problems may, for all we know, be entirely justified. Alternatively, Plaintiff may be entirely to blame for WPR's woes. However, whether or not Plaintiff was a scapegoat is irrelevant unless Plaintiff alleges that he was scapegoated due to illegal discrimination. *Hicks,* 509 U.S. at 519. ("[T]he factfinder must believe the plaintiff's explanation of intentional discrimination."); *Freeman,* 865 F.2d at 1341. The record is bereft of any sign that anyone in a decision-making role, including Mr. Morrow and Mr. Hegel, bore any discriminatory animus whatsoever. *Docket Document No. 27.* The sequence of events, as portrayed by both parties, demonstrates a gradual souring of Plaintiff's relationship with Mr. Morrow that bears no obvious nexus to Plaintiff's age or, for that matter, alleged disability. *Docket Document Nos. 1, 15, 16, 27, 28.* Plaintiff fails to present the "definite, competent evidence" necessary to show that Defendants' given reasons for the termination were pretextual. *Mesnick,* 950 F.2d at 822. "It is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must 'elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive." *Id.* at 824 (citing *Medina-Munoz,* 896 F.2d at 9); *see also LeBlanc v. Great Am. In. Co.,* 6 F.3d 836, 843 (1st Cir. 1996) ("The plaintiff cannot avert summary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer."). Therefore, we grant Defendants' summary judgment motion.

C. Supplemental Jurisdiction

Because all of Plaintiff's federal claims have been dismissed, we decline to exercise supplemental jurisdiction over Plaintiff's associated state-law claims. *Rivera v. Murphy,* 979 F.2d 259, 264 (1st Cir. 1992) (quoting *Cullen v. Mattaliano,* 690 F. Supp. 93 (D. Mass. 1988) ("[I]t is the settled rule in this Circuit that in a non-diversity case, where pendent state claims are joined with a federal cause of action and that the federal cause of action is [dismissed] . . . the pendent state claims should be dismissed.")).

IV.

Conclusion

In accordance with the foregoing, we **GRANT** Defendants' motion for summary judgment. *Docket Document No. 15.* Plaintiff's ADEA and ADA claims are **DISMISSED WITH PREJUDICE**. Plaintiff's state law causes of action are **DISMISSED WITHOUT PREJUDICE**. Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 12th day of January, 2005.

S/Jose Antonio Fuste
JOSE ANTONIO FUSTE
Chief U. S. District Judge

United States Court of Appeals
For the First Circuit

No. 05-1325

AURELIO ROSADO, ET AL.,

Plaintiffs-Appellants,

v.

WACKENHUT PUERTO RICO, INC., ET AL.,

Defendants-Appellees.

JUDGMENT

Entered: December 29, 2005

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's judgment is affirmed.

Certified and Issued as Mandate under Fed. R. App. P. 41.

Richard Cushing Donovan, Clerk

/s/ [Illegible]
Deputy Clerk

Date: 2/14/06

By the Court:

Richard Cushing Donovan, Clerk

MARGARET CARTER

By: Margaret Carter, Chief Deputy Clerk

[cc: Celina Romany, Esq., Juan M. Frontera Suau, Esq., Jose J. Sanchez Velez, Esq., Eileen M. Garcia Wirshing, Esq. and Yldefonso Lopez Morales, Esq.]

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United States Court of Appeals
For the First Circuit

No. 05-1325

AURELIO ROSADO; LYDIA ROSADO;
CONJUGAL PARTNERSHIP ROSADO-ROSADO

Plaintiffs-Appellants

v.

WACKENHUT PUERTO RICO, INC.;
WACKENHUT INTERNATIONAL, INC.

Defendants-Appellees.

Before

Boudin, *Chief Judge,*
Coffin, *Senior Circuit Judge,*
Torruella, Selya, Lynch,
Lipez and Howard, *Circuit Judges,*
Carter, *Senior District Judge.*

ORDER OF COURT

Entered: February 6, 2006

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the

petition for rehearing and the petition for rehearing en banc be denied.

By the Court:
Richard Cushing Donovan, Clerk

By: /s/ JULIE GREGG
Julie Gregg, Operations Manager

[cc: Celina Romany Siaca, Esq., Juan M. Frontera-Suau, Esq., Jose J. Sanchez Velez, Esq., Eileen Garcia-Wirshing, Esq., Yldefonso Lopez Morales, Esq.]

No. 05-1609

Supreme Court, U.S.
FILED
JUL 14 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

AURELIO ROSADO, LYDIA ROSADO,
AND THEIR CONJUGAL PARTNERSHIP,

Petitioners,

v.

WACKENHUT INTERNATIONAL, INC.
WACKENHUT PUERTO RICO, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that petitioners failed to prove their discrimination claims for they: (1) established a *prima facie* age discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, but failed to prove pretext in rebutting the employer's legitimate non-discriminatory reasons; and, (2) failed to establish a *prima facie* claim under the American with Disabilities Act, 42 U.S.C. §§ 12101-12223.

2. Whether the Court of Appeals correctly affirmed the district court's grant of summary judgment for respondent on petitioners' claim that age and disability discrimination were the reasons for his termination at Wackenhut Puerto Rico.

PARTIES TO THE PROCEEDING

Petitioners: Aurelio Rosado, Lydia Rosado, and their Conjugal Partnership

Respondents: Wackenhut International, Inc. and Wackenhut Puerto Rico, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents make the following disclosures:

1) Wackenhut Puerto Rico, Inc., informs that it is a wholly owned subsidiary of Wackenhut International, Incorporated.

2) Wackenhut International, Incorporated is a wholly owned subsidiary of the Wackenhut Corporation, a corporation registered in the United States.

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RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the respondents, Wackenhut International, Inc. and Wackenhut Puerto Rico, Inc., hereby submit this Brief in Opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported and was reprinted in the Appendix to the Petition ("Pet. App.") at 1-11. The opinion of the District Court is reported at 98 F.Supp. 2d 281, Pet. App. 12-32.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 2005. The petition for writ of certiorari was filed on May 6, 2006, and placed on the docket June 16, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners'[1] statement of the case is neither complete nor accurate. Respondents offer this brief counterstatement to address their more salient omissions and errors.

[1] Petitioners, Aurelio Rosado, Lydia Rosado, and the conjugal partnership formed between them, will be identified in this opposition brief as Petitioners or Rosado.

Rosado worked as Wackenhut Puerto Rico, Inc.'s ("WPR") General Manager from January 31, 1989 to July 12, 2004. WPR, a subsidiary of WII, is dedicated to providing security and surveillance services to the private and public sector in Puerto Rico. As General Manager, Rosado possessed broad discretion and direct responsibility of running WPR. Rosado also had to submit monthly operations reports, balance sheets, and profit and loss statements to Mr. Fernando Hegel, Vice-President of WPR's operations and Mr. William Jefferson Morrow, President of WPR's Board of Director. Pet. App. 3, 13. Rosado received periodic evaluations and yearly performance bonuses during his tenure at WPR based on his performance directing WPR. Pet. App. 3, 13.

Between 1999-2001, WPR lost a substantial number of government contracts and its revenues dropped in half. *Id.* Petitioners allege that the substantial losses were tied to government contracting and Rosado, as General Manager, could not remedy the problems. Pet. 5-6. Respondents contend that Rosado was the captain of his ship and was required to remedy WPR's operational deterioration, by making adjustments, such as reducing costs; collecting accounts receivables; and, selling more man-hours. Pet. App. 4, 14.

Despite WPR's operational woes, Rosado did not implement or devise any strategy to tackle WPR's economic debacle. Opp. App. 7-9. In fact, in two years, WPR's revenues had decreased from $33 to $16 million. *Id.*

Consequently, concerned with WPR, Morrow and Hegel directed John Griffey, a Special Project Manager in Field Support Operations for Wackenhut International, Inc. ("WII"), who provided managerial and operational support to

WII subsidiaries, to review and assess WPR and provide a sensitivity report of its operations. Griffey's sensitivity report stressed the need for improved collections, operational efficiency, and increased sales. Pet. App. 14.

Unlike petitioners statement (Pet. App. 9, 15), Rosado was provided copy of the sensitivity report as a tool to help redirect WPR. Opp. App. 13-30. However, Rosado simply chose not to address any of the critical points identified therein. WPR's swan song remained the same.

Since WPR's operations had not improved, in January or February 2002, Morrow and Hegel met with Rosado to reassess and discuss WPR's bleak state of affairs. Morrow expressed his dissatisfaction with WPR's performance and need for radical change. Pet. App. 4, 14. Morrow instructed Rosado to submit a comprehensive action plan to identify objectives to improve sales, reduce overhead, collect accounts receivable, and direct the company towards profitability. *Id.*

Several days after the meeting, Rosado suffered a cardiac arrest. Rosado was in recovery for fifty-five (55) days. During his absence, Morrow and Hegel sent Griffey, who had already examined WPR in 2001, to Puerto Rico to assist WPR's operations and provide leadership to the crumbling WPR operations. Pet. App. 4, 14. On his own accord, Griffey prepared a situation report to examine and address each facet of WPR and provide suggestions for each. The situation report detailed the problems WPR encountered and made suggestions to remedy each, such as: client contract management; collections; an operational reorganization of WPR; bid development; and, inventory control. Opp. App. 8.

Petitioners' proposed proof of pretext, the sensitivity report, makes much ado about nothing. First, Rosado was

on leave in March 2002, when Griffey submitted this report to the WPR officers, Morrow and Hegel. Second, Griffey's situation report, at page 2, identified the General Manager position as the first point in the recommendations regarding organization and structure. Suffice to note that no changes to the General Manager position (i.e., Aurelio Rosado) were recommended in this report. Opp. App. 15. Despite petitioners' theory of pretext (*see*, Pet. 17-25), no secrets or lies lay in Griffey's situation report.

In April 2002, Rosado returned to work. Contrary to petitioners' statement of fact (Pet. 7-8), Hegel requested Rosado's input (once he returned to work) as to Griffey's situation report and requested Rosado submit his own action plan. Contrary to petitioners' speculative theory that the action plan and the situation report are one in the same, Griffey's situation report was not a WPR General Manager's action plan. Instead of providing any comments, critiques or proactive recommendations to the situation report, Rosado simply chose to adopt it and not submit the required action plan. Pet. App. 9.

In sum, WPR had lost more than 75% of the business and Rosado had not implemented any directive, strategy, or plan to improve WPR's perilous situation. Rosado simply was not rendering the expected results or proposing viable alternatives. Morrow, as President of WPR, decided to terminate Rosado in July 2002. Pet. App. 8-9. Contrary to petitioners' statement that Hegel and Griffey both informed Rosado of his termination, the record speaks for itself. It was Hegel, as Rosado's direct supervisor, who met with Rosado and informed him of the company's decision. Opp. App. 9-11.

Hegel and Morrow appointed Griffey as General Manager because he had knowledge of WPR's operations and had demonstrated the initiative, interest and ability to lead WPR out of its operational chaos. Griffey had provided detailed reports on WPR and had presented detailed plans to restructure the operations towards profitability. Opp. App. 10.

Petitioners filed a complaint before the United States District Court for the District of Puerto Rico alleging that Rosado's termination was discriminatory, in violation of the ADA and their local law counterparts. Pet. App. 2, 12. The District Court entered an Opinion and Order dismissing petitioners' federal claims with prejudice and their claims under Puerto Rico law without prejudice. Pet. App. 12-32. Petitioners appealed the decision before the First Circuit alleging the District Court erred in dismissing their claims. Pet. App. 1-11.

Both the First Circuit and the District Court correctly found that Rosado did not prove his *prima facie* claim of disability discrimination. Further, the First Circuit, and the District Court, found that, although Rosado satisfied the burden of proving his *prima facie* claim under the Age Discrimination in Employment Act, *supra*, WPR had presented legitimate, non-discriminatory reasons for terminating Rosado. Pet. App. 8-9, 26-27. Further, the First Circuit found that petitioners did not provide any evidence of pretext. Pet. App. 8-9.

Now, petitioners impart their unsupported and unsupportable theory of pretext before this Honorable Supreme Court. Respondents respectfully request this petition be denied. Reasons for denying the petitions writ of *certiorari* writ petition follow.

SUMMARY OF THE ARGUMENTS

Petitioners' contend that, in considering the termination of Mr. Rosado's employment at WPR, the Court of Appeals misapplied the standards for determining whether a plaintiff has proven pretext under the ADEA. The Court of Appeals, however, correctly applied the standards stipulated by this Court for solving this issue, thus its application to the facts of this case raises no issue warranting review.

Petitioners also raise a pretext argument under the ADA. However, this argument should not be considered since the Court of Appeals correctly affirmed the District Court's determination that petitioners did not even meet their burden of proving a *prima facie* case under the ADA. In addition, petitioners waived any ADA claim since it has not been brought as an error before this Court.

THE ARGUMENT: REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DETERMINATION THAT ROSADO FAILED TO RAISE A GENUINE ISSUE OF FACT REGARDING PRETEXT UNDER THE ADEA.

A. THE FIRST CIRCUIT IS CLEAR ON PRETEXT.

Since *Feliciano* v. *El Conquistador*, 218 F.3d 1 (1st Cir. 2000), only a month after the *Reeves* precedent,[2] the First Circuit noted: "[a]lthough our prior use of the label, "pretext plus," may have resulted in a misunderstanding about the proof required to state a discrimination claim in the circuit, we have been careful to explain that the phrase did not mean that the plaintiff always must present evidence beyond the proof of pretext in order to establish discrimination."[3] Thus, the First Circuit's scope of the proof of pretext analysis has been tailored to fit the *Reeves* definition. *Zapata-Matos* v. *Reckitt & Colman, Inc.*, 277 F.3d 40, 45 (1st Cir. 2002) ("disbelief of the reason may, along with the *prima facie* case, on appropriate facts, permit the trier of fact to conclude the employer had discriminated."); *Rosado* v. *Radio Shack, Inc.*, 312 F.3d 532 (1st Cir. 2002) (The district court correctly concluded that

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[2] *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

[3] *See, Thomas* v. *Eastman Kodak Co.*, 183 F.3d 38, 57 (1st Cir. 1999), cert. denied, 145 L. Ed. 2d 1082, 120 S. Ct. 1174 (2000) ("Although it uses the label 'plus,' the First Circuit's 'pretext plus' standard does not necessarily require the introduction of additional evidence beyond the required to show pretext.") (internal quotation marks omitted).

plaintiff's evidence was insufficient to create a material issue of fact and entered summary judgment – citing Reeves); *Gillen* v. *Fallon Ambulance Serv.*, 283 F.3d 11 (1st Cir. 2002) ("the trier of fact then focuses on the main event: deciding whether the evidence adduced is sufficient to sustain a finding of discriminatory intent on the part of the defendant."); *Domínguez-Cruz* v. *Suttle Caribe, Inc.*, 202 F.3d 424, (1st Cir. 2000) ("At the summary judgment phase ... the focus should be on the ultimate issue: whether, viewing the aggregate package of proof offered by the plaintiff and taking all inferences in the plaintiff's favor, the plaintiff has raised a genuine issue of fact as to whether the termination of the plaintiff's employment was motivated by age discrimination."); *Marcano-Rivera* v. *Pueblo Int'l, Inc.*, 232 F.3d 245 (1st Cir. 2000) ("although the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing plaintiff's prima facie case 'and inferences properly drawn therefrom ... on the issue of whether the defendant's explanation is pretextual – citing Reeves.' ")

The cases highlighted above disprove petitioners' version of a First Circuit placing a *de facto* pretext-plus treatment to the *Reeves* standard. Contrary to petitioners' wishes, these decisions harmonize and are consistent with *Reeves*. By the same token, the First Circuit's analysis of pretext to the case at hand is consistent with *Reeves*. Petitioners preach pretext[4] with unsupported-by-the-record

[4] The First Circuit correctly concluded that petitioners did not present any evidence in their appellate brief to counter the respondents' legitimate, non-discriminatory reasons. In fact, petitioners' lengthy narrative before the First Circuit does not point out any record support. Petitioners did not present a scintilla of concrete evidence, a single

(Continued on following page)

theories, conclusory allegations, and conjecture insufficient to counter respondents' legitimate, non-discriminatory reasons for termination. (*See*, petitioners' brief, pgs. 7-11). Even assuming as true all the permutations of pretext petitioners present, as the First Circuit did, the issues proffered as evidence of pretext plainly are insufficient to counter WPR's reasons for termination.

Further, petitioners contend that the Court of Appeals' decision conflicts with the holdings of other circuit courts. Pet. 2-3, 12-25. But because, as explained before, the circuit court of appeals and the district court did not apply any law to petitioners' claim other than the well-established *Reeves* framework, no circuit split requiring resolution has been created.

B. PETITIONERS' VERSION OF THE CATALYST TO ROSADO'S DISMISSAL DOES NOT ESTABLISH PRETEXT.

Petitioners merely rehash the events that led to Rosado's dismissal, as Rosado perceived them, without indicating and referencing any adequate evidence to prove pretext. Petitioners cannot structure their pretext argument by presenting subjective perception, conclusions, improbable inferences, unsupported speculation and conjecture. *Macone* v. *Town of Wakefield*, 277 F.3d 1, 5 (1st

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reference to the appendix, the record, the exhibits or motions contained therein. Pet. 17-40. As this Court stated in *Conto* v. *Concord Hosp., Inc.*, 265 F.3d 79 (5th Cir. 2001). "As the Federal Rules of Appellate Procedure are sufficiently central to our judicial management responsibilities to warrant substantial compliance, rather than discretionary disregard at the convenience of counsel, Conto's fact-dependent hostile work environment claim must be deemed waived."

Cir. 2002); *Medina-Muñoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

However, even taking their perception and conclusions as true, petitioners' submit as proof of pretext that: (a) Rosado was not consulted regarding the 2001 sensitivity report, (b) one (1) comment from the President of Wackenhut El Salvador ("WES"), Miguel Angel Escobar, to Rosado that he should consider retirement (not a decision-maker); (c) Griffey's presence in Puerto Rico while he prepared the sensitivity report and, upon Rosado's leave, in 2002; and, (d) Rosado was given *only* three (3) months to prepare the action plan (petitioners' brief, pgs. 12-16).

As the Court of Appeals correctly concluded, petitioners' evidence (in its most favorable light) is insufficient to prove, by a preponderance of the evidence, that the legitimate reasons respondents offered were not the true reasons for Rosado's termination, but a pretext for discrimination. Pet. App. 8-9, 26-27. Simply, petitioners failed to present facts from the record to support their assertions of discrimination. Unfounded theories and wishful speculation are insufficient to prove pretext, and surely not enough to warrant this Court's review of bedrock principles guided by *Reeves*. Therefore, petitioners' contention is, without a doubt, meritless.

Let us examine the Court of Appeals' decision.

The Court of Appeals took into account the circumstantial evidence petitioners' introduced to support their claim of discrimination and held that petitioners "satisfied the prima facie case factors." Pet. App. 7. The Court then determined that WPR met its burden of production by presenting evidence that "Mr. Rosado was discharged because his managerial performance since 1998 was

unsatisfactory and because WPR was suffering lack of effective leadership." *Id.* The court went on to note, correctly [citing its previous decisions in *Domínguez-Cruz* v. *Suttle Caribe, Inc.*, 202 F.3d 424, 430 (1st Cir. 2000) and *Mesnick* v. *Gen. Elec. Co.*, 950 F.2d 816, 823 (1st Cir. 1991), that Mr. Rosado had to show that WPR's "alleged justification was not its true reason for the adverse employment action, but was a mere pretext for age discrimination." Pet. App. 7. In that regard, it clearly stated that "Mr. Rosado must produce evidence beyond the mere assertion that the alleged justification is implausible and show that the employer's discriminatory animus actually motivated the adverse employment action." Pet. App. 7-8. **The Court then found petitioners' evidence insufficient to prove pretext.** Pet. App. 8-9.

The evidence petitioners produced to establish pretext was the following:

(a) *The 2001 sensitivity report*: In this regard, the Court of Appeals correctly determined that the fact that Rosado purports he was kept out of the loop on the sensitivity report does not in any way suggest that respondents' performance-based reasons for terminating Rosado were false. Pet. App. 8-9.

(b) *The Retirement Comments*: The Court of Appeals and the District Court correctly determined that a comment from a non-decision maker from another WII subsidiary during a telephone conversation with Rosado is insufficient evidence of pretext. Pet. App. 5, 8-9, 15, 26-27. This isolated remark, from someone unconcerned with the decision-making process of WPR was deficient to counter WPR's reasons for dismissing Rosado. *Id.* Further, the statement did not prove illegal discrimination, as the

statement and the person who made it were far removed from the actual employment action. *See, Lauren v. Providence Hosp.*, 150 F.3d 52, 58 (1st Cir. 1998). Remarks by non-decision makers generally are not probative of an employer's intent. *Santiago v. Canon U.S.A., Inc.*, 138 F.3d 1, 6 n.8 (1st Cir. 1998) (noting that "stray remarks in the workplace . . . , statements by non-decision makers, or statements by decision makers unrelated to the decisional process itself" normally are insufficient to establish discriminatory animus); *Lehmen v. Prudential Ins. Co. of Am.*, 74 F.3d 323, 329 (1st Cir. 1996) ("Isolated, ambiguous remarks are insufficient, by themselves, to prove discriminatory intent.").

(c) *Griffey's presence in WPR*: The mere fact that Griffey came to prepare a sensitivity report in 2001 is insufficient to prove any pretext. Pet. App. 8-9, 27. After all, Griffey's position as Special Project Manager for WII Field Support Operations, was precisely that of offering support and assistance to general managers of WII affiliates and subsidiaries. His visit to Puerto Rico stemmed from WPR's legitimate concern that revenues had dropped from $33 million to $16 million. Griffey prepared the sensitivity report with recommendations on manners to redirect the operation. Unlike the scheme petitioners try to present, the sensitivity report was a tool to assist Rosado in redirecting his operations. Rosado ignored this tool and did not implement any changes of his own. WPR remained in critical condition, without signs of improvement.

(d) *The Action Plan*: Unlike petitioners' characterization of Morrow giving him a "second chance" to redirect WPR with an action plan but not offering him enough time to prepare same, the record reflects Morrow's impatience

and growing frustration with Rosado. Pet. App. 9, 27. The record also reflects Morrow's no-nonsense meeting with Rosado was, not a second chance but, a final warning that either Rosado shape up the operations or ship out. *Id.* Morrow's meeting and the request for an action plan hold no collusion. *Id.* WPR's situation was critical. Pet. App. 25-26. Morrow mandated change and direction from his general manager. If Morrow did not see any, he even was considering closing WPR for good. He spoke frankly with Rosado. However, even after Hegel reiterated Morrow's request that Rosado submit the action plan, he simply did not render the required action plan or any other plan, for that matter. Opp. App. 9.

Viewed in its most favorable light, these four points fail to counter WPR's legitimate business reasons or create a trial-worthy issue of pretext under the ADEA. Petitioners have not presented any other evidence as pretext. Therefore, they fail to demonstrate that WPR fabricated economic losses under Rosado's direction in order to conceal their discriminatory motives, much less have they proved any inconsistencies regarding WPR's performance-related reasons for termination.

Evidently, WPR suffered a decrease from $33 million to $16 million in revenues. Also, WPR was not collecting on accounts receivables; which reached a whopping $4 million. Rosado, as General Manager, knew WPR's operations had reached a critical level and, despite management's instructions, did not redirect the operations to the

point where WPR on the brink of extinction.[6] Opp. App. 4-9.

As respondents meander through the winding road of their pretext claim, petitioners simply fall short of the finish line for they cannot withstand any basic threshold for pretext. The end of the road leads us to the beginning, WPR's consistent and uncontested reasons for reaching its termination decision. These reasons hold no falsity, collusion or contradiction.

In fact, the only contradiction found is Rosado's disagreement with WPR's higher management, i.e. Morrow and Hegel, on its need to implement change and propose viable alternatives in WPR. However, Rosado's disagreement does not suffice to prove pretext. *See*, *Shorett* v. *Rite Aid of Maine, Inc.*, 155 F.3d 8, 15 (1st Cir. 1998) (On the question whether an explanation of poor job performance is pretext, a plaintiff's mere personal disagreement with the employer's opinions about her job performance is not sufficiently probative to avoid summary judgment.); *Holifield* v. *Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997); *Ost* v. *West Suburban Travelers Limousine, Inc.*, 99 F.3d 435, 441 (7th Cir. 1996); *Benham* v. *Lenox Savings Bank*, 118 F. Supp. 2d 132 (D. Mass. 2000) (Same).

Rhetoric, speculation and hyperbole aside, petitioners simply did not, for they could not, prove that WPR's legitimate, nondiscriminatory reason for its discharge

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[6] Contrary to Rosado's unsupported statement that he wrote to Hegel on "several" occasions (Pet. 6), the record only provides one letter in February where Rosado merely offers explanations and justifications for one of the issues encountered at WPR. Opp. App. 4.

decision was pretextual. Respondents' reasons were not fabricated, inconsistent, contradictory or unfounded. These reasons find support in the record; in WPR's audited financial statements; in the reason Morrow and Hegel looked Griffey's first ticket to Puerto Rico in 2001 to prepare a sensitivity report; in the fact that, despite the tool provided in the sensitivity report, no changes were implemented to redirect WPR for two (2) years, and, that Rosado did not even prepare the required action plan for WPR. With this performance backdrop in mind, petitioners failed to present sufficient evidence to contest WPR's legitimate, non-discriminatory reasons for Rosado's termination. Pet. App. 8-9, 26-28. As the Court of Appeals correctly analyzed, even taking all of petitioners' evidence as true, this evidence does not prove pretext. *Id. Reeves'* spirit is evident throughout the decision.

WPR, Morrow and Hegel, did not mask their increasing dissatisfaction with Rosado's managerial performance; WPR did not invent their concern that WPR suffered a lack of effective leadership. As the District Court stated: "The record is so colored with evidence of WPR's troubled financial health, and with WII President Morrow's growing impatience with WPR's lackluster performance, that Defendants' rebuttal hardly requires further discussion." *Docket Nos. 1, 16, 16, 17, 27, 28.* Pet. App. 25.

In sum, the Court of Appeals correctly applied the pretext standard of *Reeves* as it would in any discrimination case, taking into account all the circumstantial evidence petitioner presented. It determined that, based on the record in this case, petitioner "failed to present evidence necessary to show that Wackenhut defendants' given reasons for the termination were pretextual." Pet. App. 8. Thus, petitioners' assertion, in addressing pretext,

is incorrect. The petitioners simply did not satisfy their burden of production because they did not come forward with any evidence to suggest that the reason articulated for his termination was pretextual. The Court took into account petitioners' evidence, but ultimately found no showing of age discrimination. Since no trier of fact could find age discrimination on this record, and since the court undoubtedly applied the correct legal standards, certiorari should be denied.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT ROSADO DID NOT FULFILL ITS BURDEN OF PRESENTING A *PRIMA FACIE* CASE OF DISABILITY DISCRIMINATION UNDER THE ADA.

Although the question petitioners present before the Court addresses pretext in the ADEA claim. (*See*, Section I of petitioners' brief), petitioners commingle their analysis with their ADA claim throughout the brief. Pet. 3, 16-17. In the interest of clarity, respondents elucidate that both the Court of Appeals and the District Court correctly determined that petitioners did not meet the *prima facie* burden under the ADA. As a result, petitioners need go no further on pretex.

As petitioners have not formulated an error as to the Court of Appeals determination regarding their failure to prove a *prima facie* disability discrimination claim under ADA, any analysis on pretext on this count is superfluous and not brought properly before this Court.

Therefore, any argument or error regarding the court's determination on failure to meet the *prima facie* burden under the ADA is waived. *Rivera Gómez* v. *de*

Castro, 843 F.2d 631, 635 (1st Cir. 1988); *Shakur* v. *Selsky*, 391 F.3d 106 (2nd Cir. 2004); *Cavallo* v. *Star Enter.*, 100 F.3d 1150, 1152, n.2 (4th Cir. 1996); *United States* v. *García*, 242 F.3d 593, 599 n.5 (5th Cir. 2001); *Boyd* v. *Ford Motor Co.*, 948 F.2d 283, 284 (6th Cir. 1991), cert. denied, 503 U.S. 939 (1992); *Wildlife Exp. Corp.* v. *Carol Wright Sales, Inc.*, 18 F.3d 502, 508 n.5 (7th Cir. 1994); *Leer* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *Wilken* v. *United States*, 289 F.3d 684, 689 n.9 (11th Cir. 2002); *Doe* v. *District of Columbia*, 93 F.3d 861, 875 n.14 (D.C. Cir. 1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Aurelio Rosado Plaintiff vs Wackenhut Puerto Rico Inc.; Wackenhut International, Inc. Defendant	CIVIL NO. 2003-1737 (JAF) RE: AGE DISCRIMINATION & DISABILITY TRIAL BY JURY

STATEMENT OF UNCONTESTED FACTS

TO THE HONORABLE COURT:

DEFENDANT Wackenhut Puerto Rico Inc. ("WPR") and Wackenhut International, Inc. ("WII"), through the undersigned counsels, and pursuant to Local Rule 311.12, respectfully submit a statement of uncontested facts supporting its motion for summary judgment under Fed.R.Civ.P. 56.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

1. WII is a parent company of the WPR. WPR is a company dedicated to providing security and surveillance services. WII is primarily responsible for the Wackenhut subsidiaries and affiliates outside of the United States. Transcript of Mr. William Jefferson Morrow's deposition, Morrow's deposition, taken on May 7, 2004, Exhibit A, "Morrow's deposition", p. 26, L. 5-23, p. 27.

2. The affiliates and subsidiaries of WII are separate legal entities. WPR is a subsidiary of WII. WPR has its

own Board of Directors and is an independent company from WII. As such, WPR is a separate legal entity, incorporated under the laws of Puerto Rico and has its own Board of Directors. WPR's Board of Directors is solely responsible for handling the human resources issues. Morrow's deposition, p. 33, L. 16-24; p. 39, L. 9-20. Transcript of Mr. Fernando Hegel's deposition, taken on January 23, 2004, attached hereto as Exhibit B; "Hegel's deposition", p. 44, L. 2-21.

3. In WII's corporate structure, the General Manager of each subsidiary and affiliate is fully responsible for the operations of the country they manage. The General Managers have broad decision-making power. The General Managers of Wackenhut's country operations have broad discretion and control over the contracts; clients they pursue; recruiting; and the operations they manage. Corporate headquarters do not recommend specific actions to implement because each country has a different culture, a different environment, legislation varies from country to country. Therefore, the General Manager is the person in charge of running the operations in the specific country. They are expected to act and manage. Hegel's deposition, p. 91, L. 19-22; p. 92-94; p. 99-100, p. 179, L. 4-9. Morrow's deposition, p. 61-62; p. 64, L. 19-24, p. 65, p. 67.

4. Each general manager for each subsidiary has to submit to WII headquarters monthly reports regarding their operations, a balance sheet and a Profit and Loss sheet ("P & L"). Every year, each of the General Managers for Wackenhut's country operations must submit a budget for the upcoming fiscal year and a corporate management plan. Aside from the above, the interaction between the General Manager and the Vice President of Operations of WPR, Mr. Fernando Hegel ("Hegel"), or the President of

WPR, Mr. William Jefferson Morrow ("Morrow"), is basically limited to an annual meeting and the discussion and approval of the budget and action plans. Hegel's deposition, p. 48-50; p. 52-54.

5. Hegel and Mr. Fernando Carrizosa ("Carrizosa"), President of Wackenhut Puerto Rico prior to succeeded by Morrow, evaluated the General Managers under their wing. These evaluations are based on performance, results, and customer satisfaction. They analyze various factors, such as: budgeted versus actual revenues, budgeted versus actual profits, and accounts receivables. Hegel's deposition, p. 77-80.

6. Aurelio Rosado ("Rosado") began working as General Manager for WPR on January 31, 1989. He ceased working for the company on July 12, 2002, when he was terminated. Transcript of Aurelio Rosado's deposition, taken on May 12, 2004, attached hereto as Exhibit C, "Rosado's deposition", p. 16, L 22-24, p.17-19; Verified Complaint, par. 7.

7. As General Manager for WPR, Rosado would decide the appropriate bid proposal based on the client, Rosado's knowledge of the business in Puerto Rico and its competitors. Under Rosado's command as General Manager in the early to mid-nineties, Wackenhut started to grow by obtaining government contracts won in the bidding process. WPR had contracts with several government agencies, pharmaceuticals, the University of the Sacred Heart, Centro Sor Isolina Ferré, and Puerto Rican Cement. Between 1989-1998, grew and improved its performance. Rosado received good evaluations during this time. Rosado's deposition, p.20-25; Hegel's deposition, p. 84-90.

8. Beginning in late 1998 through 2001, WPR lost all government contracts and more than half of its revenues. WPR started experiencing problems and concern grew regarding various aspects of the WPR operations. WPR's President at the time, Carrizosa, requested Rosado address the following areas: *collecting on accounts receivables*; reaching their financial objectives; total reliance on government contracting as the main client; the overtime and overhead expenses; and the need to improve and diversify the client roster. Rosado's deposition, p. 25, L. 3-24, p. 47, L. 1-21, p. 36 L. 15-24; p. 37, L.1; Hegel's deposition, p. 84-91, L. 1; Copy of letter from Fernando Carrizosa, the President of WPR, to Rosado, dated December 28, 1998, attached hereto as Exhibit D, documents which were provided in Exhibit 1 of Defendants' Answer to Request for Production of Documents.

9. Carrizosa, the President of WPR, and/or Hegel, Vice President of WPR, would meet with Rosado and discuss sales once or twice a year during Rosado's rate and performance bonus. Rosado's deposition p. 57, L. 6-24; p. 58-61

10. During 1999-2001, Carrizosa and Hegel discussed with Rosado on various occasions the impact of the loss of government contracts and the need to redirect sales. Rosado knew WPR was undergoing a critical economic situation. Hegel and Carrizosa requested Rosado focus on mitigating the loss of the government contracts, increase and redirect sales efforts and implement change to improve the situation. Both Carrizosa and Hegel informed Rosado that the fiscal situation had to change and he needed to address these critical issues immediately. Rosado responded to these concerns and requests with two letters that merely offered explanations regarding some of

the aspects in WPR, nothing else. Rosado's deposition, p. 56, L. 8-24; p. 57, L. 1-3; Hegel's deposition, p. 91, L. 19-22; p. 92-94; p. 99-100, p. 179, L. 4-9. See, also, Copy of the two letters Rosado sent to Hegel in response to the company's concerns on February 10, 2001 and February 11, 2001, attached hereto as Exhibit E and copy of the balance sheets for 1999-2001, attached hereto as Exhibit F; documents which were provided in Exhibit 1 of Defendants' Answer to Request for Production of Documents.

11. In addition to responding to WPR's concerns with the two February 2001 letters, Rosado: (1) encouraged his sales person, Luis Giraldo, to continue selling, and (2) reduced his data entry personnel in order to ease the impact of the government contract losses. Aside from these two steps, Rosado did not implement any other changes in the Puerto Rico operations, He did not believe any other preventive measure could be taken. Rosado's deposition, p. 47, L. 22-24; p.48, L. 1-9, p. 50-51.

12. By June 2001, more than three years had passed, and WPR's fiscal situation reached a critical point. The revenues had decreased from $33 million to $16 million. WII sent John Griffey ("Griffey"), a Special Project Manager in Field Support Operations for WII, who provided managerial and operational support to various general managers in different countries, to Puerto Rico. The purpose of his visit was to review WPR and provide a sensitivity report. During July 2001, Griffey visited Puerto Rico, analyzed the situation in WPR, and drafted a sensitivity report with various recommendations. Hegel's deposition, p. 106-112; p. 117-119. Rosado's deposition, p. 52, L. 17-24; p. 53 L. 1-15; p. 54, L. 4-24; p. 55-56. Transcript of John Griffey's deposition, taken on January 23,

2004, Exhibit G, "Griffey's deposition", p. 58, L.5-19, p. 65-66.

13. The sensitivity report addressed critical areas in WPR requiring immediate improvement. WPR operations had radically decreased; how the loss of two major accounts would impact WPR, the operational redirection that WPR had to undergo; the total failure of collections amassing a whopping $4 million in account receivables; excessive operational costs; the strategy to increase sales. Griffey and Rosado shared ideas during this process and the preparation of the report. Griffey shared his recommendations with Rosado. Rosado disagreed with many aspects included in Griffey's recommendations, Griffey's deposition, p. 66-69, L. 1-21, p. 93, L. 7-24, p. 94, L. 1-12, p. 102-109, p. 116, L. 10-25, p. 117-119. See copy of electronic transmission from Griffey to Carrizosa, dated July 3, 2001, reporting the meeting with Rosado, attached hereto as Exhibit H. See also, copy of the sensitivity report Griffey prepared, dated July 30, 2001, attached hereto as Exhibit I, these documents were also submitted in Exhibit 3 of Defendants' Answer to Request for Production of Documents.

14. Hegel met with Rosado to discuss the P & L Reports, the sensitivity analysis, and to discuss actions to implement to recover from the impact of the loss. Rosado informed that he was concerned with the pricing in Puerto Rico. He believed WPR could not grow because its rates were too high. However, Rosado as General Manager, had discretion as to the rates he implemented the expansion strategy or market penetration and was responsible for redirecting the revenue and market loss. Hagel's deposition, p. 114-119.

15. When Morrow became President of WII in 2001, as well as president of the WPR Board of Directors, WII headquarters started to focus on its subsidiaries and affiliates. Morrow evaluated the WPR operations. At that time, WPR had lost half of its business and collections on accounts receivable had reached a $4 million high. Upon review, he understood that Rosado as General Manager needed to address immediately the impact of the losses; the accounts receivable and collections problem; as well as redirecting sales. Morrow's deposition, p. 45-54.

16. In January 2002, after WPR had lost 75% of its revenues, Hegel and Morrow met with Rosado in Puerto Rico to discuss the WPR situation. They requested Rosado submit a comprehensive action plan by February 2002. This action plan was to identify objectives to improve sales, reduce overhead, collect accounts receivable, and gear the company towards profitability. During the meeting between Hegel, Morrow and Rosado, Morrow informed Rosado that the situation in Puerto Rico had to change and that if it did not, he would have to close WPR. Hegel's deposition, p. 121, L. 1-22; p. 122, L. 1-14. Rosado's deposition, p. 63, L.5-20; p. 64, L.4-24; p. 65-69, p. 107, L. 3-15. Morrow's deposition, p. 67-75.

17. Soon thereafter, in early February 2002, Rosado suffered a cardiac arrest. Rosado was hospitalized for around 25 days and was ordered to rest and recuperate. Around 50 days after the heart attack, Rosado returned to work. Rosado's deposition, p. 70, L. 9-14; L. 23-24; p. 71, L. 1-2, p. 72, L. 2-14. Hegel's deposition p. 124, L.1-6.

18. Rosado did not submit the action plan in February 2002. In the meantime, WPR was still undergoing a critical situation. Since Rosado was unable to submit the

action plan to address the troubled economic situation, Hegel and Morrow opted to send Griffey, who was familiar with the Puerto Rico operations as a result of his visit in 2001, to Puerto Rico, to prepare a report and recommendations for the action plan. Also, Griffey was brought to Puerto Rico to hold the fort and offer support to sustain WPR during Rosado's absence. During Rosado's recovery, Griffey was named Assistant General Manager to fill the leadership void of Rosado's absence; provide direction to the WPR; providing leadership to the staff sustaining the operations and ensuring customers that WPR was still taking care of the business. Hegel's deposition, p. 126, L. 11-20, p. 127-129, p. 130, L.15-20, p. 131, L. 1-17, p. 133, L. 3-17, p. 134, L. 8-17; p. 162, L. 7-21; p. 163-164. Rosado's deposition, p. 72, L. 15-24; p. 73-74; p. 82, L. 19.24; p. 83, L. 1. Morrow's deposition, p. 75, L. 14-24, p. 76, p. 78, p. 81, L. 21-24, p. 82, L. 1, p. 89, L. 11-19.

19. During Rosado's absence, Griffey prepared a situation report of the WPR operations and the projects implemented to alleviate the critical situation in WPR. The situation report provided a detailed account of the following issues, among others: client contract management; collections; a detailed reorganization of the Puerto Rico operations; bid development; and inventory control. Griffey provided suggestions for each area. See copy of the Situation Report Griffey prepared in March 28, 2001, attached hereto as Exhibit J, document which was provided in Exhibit 3 and 7 of Defendants' Answer to Request for Production of Documents.

20. Rosado returned to his position of General Manager in April 2002, using the same office, supervising the same subordinates, and handling the same duties and responsibilities as before, Rosado's deposition, p. 79, L. 12-19;

p. 85, L. 4-9; L. 16-24; p. 86, L. 1-8; Hegel's deposition, p. 135, L. 12-20.

21. Since Rosado did not indicate otherwise once he recovered and returned in April 2002, WPR expected Rosado to perform the duties of his position as General Manager and submit the action plan. As a result, Hegel requested Rosado's action plan to address the issues that had been hindering WPR's performance. Hegel's deposition, p.135, L. 12-19. See also, copy or electronic mail from Hegel to Rosado, dated April 9, 2002, attached hereto as Exhibit K, documents contained in Exhibit 1 of Defendants' Answer to Request for Production of Documents.

22. Rosado and Griffey discussed Griffey's report and suggestions. Rosado disagreed with Griffey's suggestions and they discussed these differences. Rosado believed some of the suggestions Griffey was making could not be implemented in Puerto Rico. Hegel, in turn, requested Rosado provide comments on Griffey's suggestions. Rosado did not provide those comments or make additional recommendations. Rosado never prepared a satisfactory action plan. Rosado simply directed his comptroller to provide a limited report. Rosado's deposition, p. 73, L. 2-24; p.74-79, L. 1-11.

23. Rosado's performance as General Manager had been declining since 1998, reaching critical levels in 1999, 2000, 2001 and 2002. Rosado had not responded to WPR's request to redirect the sales losses and revenues. As General Manager, Rosado simply was not rendering any results for WPR, not even the action plan that was requested of him. WPR had lost more than 75% of the business and Rosado had not implemented anything as General Manager to improve or change the situation.

Hegel and Morrow believed Rosado took a laissez-faire attitude and did absolutely nothing to change or ameliorate the situation, despite their multiple requests to do so. In light of the above, WPR's President, Morrow, in his capacity as President of the WPR Board of Directors, decided to terminate Rosado in July 2002. Hegel's deposition, p. 137, L. 6-21; p. 138 L. 141; p. 143-144; p. 145. Morrow's deposition, p. 79, L. 14-24, p. 80-83, p. 86-88, p. 90, L. 20-24, p. 91-92. Rosado's deposition, p. 88, L. 11-24; p. 90, L. 1-13.

24. The decision to terminate Rosado was based on his performance, his lack of initiative, his failure to provide a comprehensive action plan, and to show any signs of improving the critical situation in WPR. Hegel's deposition, p. 143-145, L. 1-14.

25. Once Rosado's termination was decided, Hegel and Morrow discussed who was going to become General Manager for WPR, Hegel recommended Griffey because of his experience within Wackenhut, his operations experience and he [sic] familiarity with the Puerto Rico. Hegel's deposition, p. 149-151.

26. Rosado believes that he was terminated from his employment with WPR primarily because of his age, and because he suffered a second heart attack. Further, Rosado believes he was discriminated against because Griffey partook in some of Rosado's functions as General Manager during his absence. Rosado's deposition, p. 92, L. 5-13, p. 95, L. 17-24; p. 96.

27. At the time of his termination, Rosado's salary was $152,000.00; a $40,000.00 performance bonus; and a $10,000.00 bonus for proper handling of the credit line. Rosado's deposition, p. 98, L. 5-21.

28. Griffey was not involved, nor did he participate in the decision to terminate Rosado. Hegel's deposition, p. 142, L. 1-12; Griffey's deposition, p. 134, L. 5-15.

29. Rosado admits no one in WPR or WII made any comments or acted in any way to make him believe that age and/or an alleged disability factored into the company's decision to terminate him. Rosado's deposition, p. 93, L. 1-8; p. 94, L. 18-24; p. 95, L. 1-3.

30. Rosado only identifies one comment from the President of Wackenhut El Salvador, Miguel Angel Escobar, who called Rosado at work and asked him, "Aurelio why don't you retire?" No one else participated in the conversation. Wackenhut El Salvador is an entirely different subsidiary of WII and is completely unrelated to the WPR operations. Rosado admits that no one in WPR or WII told him that his heart condition factored into the decision to terminate him. Rosado's deposition, p. 93, L. 3-24, p. 94-95.

31. Griffey was appointed General Manager for WPR on July 12, 2002. He turned forty (40) on that same day. See Griffey's deposition, p. 133, L. 3-6; Verified complaint, Statement of Claim, Page 7.

32. Hegel did not know Griffey's age at the time Griffey was appointed General Manager. Hegel's deposition, p.152, L. 4-9.

The above are the uncontested facts submitted in support of the motion for summary judgment that defendants have filed this same day.

In San Juan, Puerto Rico, this 28th day of June 2004.

WE HEREBY CERTIFY that on this date, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Plaintiff's counsels, Juan M. Frontera Suau and Celina Romany.

Respectfully submitted by,
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[LOGO]

PTR SITREP

TO: Fernando Hegel, VP Latin America — DATE: 03/28/02

CC: Jeff Morrow, Sr. VP, WII

FROM: John Griffey, Acting GM, WPTR — DIV/AREA: WII

SUBJECT: Situation Report

Hello Fernando,

Based on our conversations I wish to give a written account of the progress being made thus far with Wackenhut Puerto Rico Inc. the following is a synopsis of the projects underway at this point in time.

1. **Support Visit from Don Perkarsky and Allison Texiera:** The support visit went very well. On Friday, we had a debriefing and basically identified some priorities that must be established to control some of the problems we are encountering on a regular basis. Of the major priorities is Collections and Validation and Accuracy of information input on the CCM (Client Contract Management) System. Additionally there are some other operational issues we addressed which will be outlined in this report.

2. **Collections:** After the support visit Isabel Cotta, Carlos Reyes and I met to discuss a plan to initiate for collections. Isabel created a list identifying all customers with significant outstanding balances of over 120 and 365 days on the aging report. From the list are the following clients which are considered the highest priority for us:

Client Name	Aging 120-356 days
ADM. REHAVILITACION VOC	$800,645.41
AUT EDIFICIOS PUB	$70,882.64
CARIBE GE	$122,287.75
COMISION ESTATAL DE ELECT	$215,685.62
DEPARTAMENTO FAMILIA	$361,897.79
PFIZER GLOBAL MNFG	$464,817.75
SCHERING PLOUGH	$362,853.81
Total	**$2,597,726.82**

I have a meeting with Pfizer on Tuesday at 10:00 to discuss their outstanding balance. Schering and Caribe are on the same list and we are arranging meeting with them also. I can't guarantee if we will meet before the Easter break. Regardless, this is am [sic] item on my priority list. Once I contact the key p[ersonnel [sic] of each of these organizations, I will not let go until the [sic] pay up.

3 **Reorganization:** Please see the following Powerpoint Presentation of the changes we propose. Of course, no changes will be made until I receive approval from you. In the presentation you will note a consolidation of regions. This will increase coverage but decrease personnel. To offset the effects of increase areas, we have identified sites with several posts that will have Sr. guards delegated to accomplish quasi-supervisory functions. This will free the shift supervisors to cover a larger area during the same amount of time.

- We can be ready to implement the plan during the first week of April

On page 5 of the Powerpoint Presentation, you will note highlighted lines (yellow). These highlights mark

the moves and changes in the overhead proposed. On the last slide, you will note a table of changes the Left Side represents our current organization now. The Right Side repesents the proposed changes. On the far left side you will note a olumn of numbers. These numbers are the record numbers and will be used to identify the changes which are explained below.

1. General Manager, Aurelio Rosado – No Change
2. Secretary. The General Manager Secretary will be eliminated. This position will be filled with the Business Development Secretary who will accomplish both functions.
3. BD Rep, No Change
4. DB Proposal Writer – Moved to position #2.
5. HR Manager – No Change
6. Trainer – Moved to operations and will continue to train and implement and perform Quality Control functions.
7. HR Secretary – moved to CCO position
8. HR Investigator – Will conduct investigations and interviews
9. HR data entry clerk – No Change
10. HR Clerk – No Change
11. HR Warehouse Clerk – Moved to Accounting position #26 and will also perform Fleet Management.
12. HR Switchboard Operator – will be replaced with automated switchboard/voice mail system ($5,500) see notes on previous pages.
13. HR benefits specialist – No Change

14. Electronics Manager – No Change
15. Electronics Secretary will also provide functions as General Secretary
16. Electronics Technician – No Change
17. Electronics Technician – No Change
18. Electronics Technician – No Change
19. General Accountant – No Change
20. Accounts payable – No Change
21. Collections Supervisor – No Change
22. Collections Clerk – No Change
23. Accounting Assurance – No Change
24. Accounting Assurance Assistance – Replaced Area manager and will continue to do the CCM functions as well as the Area Manager functions.
25. Warehouse/Inventory/Fleet management/Messenger – Moved here from Position # 11
26. Operations Manager – No Change
27. Command Center – Move two of the CCOs' [sic] to billable jobs and replace them with positions # 7 and #12.
28. Mechanic – Eliminate position. This function will be performed by Position #25.
29. Q/C – Trainer Moved from position #6
30. Area Manager Caguas/Metro – Change to Area Manager North East Consolidate regions.
31. Area Manager North East (2) was called Area Manager Bayamon/Arecibo. Will work with Area

manager North East #1 but during different times of the day to provide 16-20 hours of on-site area management.

32. Field Supervisor Caguas/Metro – consolidated region will now be required to cover a larger area. To assure this is possible, we have identified all clients with multiple posts in one site. These key sites have a Sr. guard assigned to them. The Sr. guard will perform the functions of the area supervisor. The area supervisor will not have to visit this post every shift, which will enable the shift supervisors to cover a larger area as noted in the consolidation.

33. CPO Cag/Metro – Changed to Shift Supervisor for North East Area

34. CPO Cag/Metro – Changed to Shift Supervisor for North East Area

35. CPO Cag/Metro – Changed to Shift Supervisor for North East Area

36. Area Manager Bay/Are shifted to position #32

37. Field Supv (Bay/Are) eliminated due to consolidation – moved to billable job with overhead cost to compensate for difference in billable rate of that job. Undetermined which job to move to.

38. Field Supv (Bay/Are) – Eliminate position.

39. Field Supv (Bay/Are) eliminated due to consolidation – moved to billable job with overhead cost to compensate for difference in billable rate of that job. Undetermined which job to move to.

40. Area Manager Pon/May – No Change

41. Captain Pon/May – No Change

42. Supervisor Pon/May – No Change
43. Supervisor Pon/May – No change
44. Supervisor Pon/May – No change
45. Supervisor Pon/May – No change
46. Supervisor Pon/May – No change
47. Supervisor Pon/May – No change

- The reduction in personnel from overhead is based on two re-organizational methods. One being shifts from overhead positions to Billable Jobs. The other, position elimination as outlined above.

  The results are as follows:

	Salaries	# Pers
Total Current	$881,030	47
Total Proposed	$787,057	39
Total OH Reduction in Salaries and Wages	$93,973	8
Total OH Reduction in FICA, FUI, SUI VAC, Sick Leave	$15,994	
Total OH Reduction	$109,967	
Total Reduction in $ (%)	10.67%	
Total Reduction Personnel (%)	17.02%	

- Once we have established some stability with the reorganization, we will be able to evaluate and present a Phase II to decrease more overhead payroll.

- Finally, if we are to compare Wackenhut Puerto Rico Inc. to a NAO branch office we have to consider that Wackenhut Puerto Rico Inc requires the following additional personnel to function properly

  - General Accountant (controlling the finances of two offices) — 1 person
  - Accounts Payable/Bookkeeper — 1 person
  - CCO (Communications Center — 4 people
  - Alarms division — 5 people

  The above account adds 11 additional personnel to the operation. If we were to subtract these 11 people from the reorganization plan this would bring us to 28 people in our office and four are less than full time employees. So if we compare Wackenhut Puerto Rico with an NOA branch, considering the above notes, we are doing just as well for the amount of hours sold on a weekly basis (18 – 20K). Note that this is a comparison of personnel count only. The payroll effects are a different story which is most important –

4. **Fleet Management Program:** As you know, prior to the reduction in hours, we had 46 vehicles.

   16 were sold

   2 were totaled in accidents.

   There are 2 in the workshop

   1 is assigned to Aurelio.

   3 motorcycles assigned to clients.

   1 vehicle is assigned to Puerto Rico Cement (client).

   4 vehicles assigned to alarms division

8 are assigned to Managers of the company as part of their benefits package (includes maintenance and gasoline)

The remaining 9 are dedicated to operations.

All vehicles have fuel cards assigned to them with no monthy limit I have reviewed the fuel consumption reports and cannot identify any abuse.

5. **Scheduling Program.** As you know we are currently using the Client Contract Management (CCM) for the administration of all our contracts. The system includes a scheduling module which works in cycles of 7 days. You can have only one cycle active at a time. To help in projecting operational activity we are developing a scheduling program that will give the next weeks schedules with personnel assignments. The same scheduling system will also be used for time card control and registering the unscheduled operational activity (absenteeism, vacations, tardy). It will also be the main tool used to count the required personnel needed for the staffing of our Jobs (which we don't have at this moment. Without it we run into unscheduled OT that could have need controlled. We plan to run a test on 25 March for one week to tweek the system and then implement it, fully in April.

6. **Telephone Switchboard Automation:** As part of the reorganization program, we propose to remove the switch board operator and have her replaced with an automated switchboard which also ahs [sic] voice mail capability. In the event there is an emergency the caller can simply dial zero to speak with the Command Center. After meeting with CORTELCO, the telephone system provider for Wackenhut Puerto Rico Inc, I learned that the board required for this service will cost $5,544.00. It includes the following features which are considered STANDARD:

- 100 User Mailboxes
- Mailbox passwords
- Personalized greeting messages (2)
- Pager/Beeper Notification
- Time and date stamp for incoming messages
- Announce Only mailbox
- Group Mailboxes (distribution lists)
- Auto Attendant (Day/Night/Weekend Modes)
- Access Menus
- Directory Lists
- Audiotext
- Set Up Instructions via voice

The Installation is seamless and will take about 4 hours. If the purchase of this board is approved, it will take about 10 days from time of order to installation. I have not found other quotes as CORTELCO, the provider of this quote is the company that provides maintenance for our telephone communication system. The board (Protégé Voice Auto Attendant Voice Mail System was designed for our existing Protégé Telephone system.

7. **Bid development Process and Standardization:** I have reviewed the standard service contract we have here and noted some things that I believe are not good for us. I made some changes and would like Legal to review them. Please see the attached Standard Contract Form Question – If we have a client who asks for additional or emergency services, do we provide at the same billing rate as the standard service, if they give us advanced notice of 24 hours? Please

note changes made and advise of any other concerns. I would really like legal to take a look at it. We will not use it until it is approved by TWC and Local Lawyers.

Additionally we are in the process of making a W-46 type of costing spreadsheet. Once out [sic] model is finished, as Fernando Hegel advised, I will send it to henry Cujo so he can format it into the standard W-46 format.

Once the reorganization program has been approved, I plan to implement the Quality Control Program this will take about a week to implement, behind the scene. It will definitely increase the productivity of our personnel

8. **Part Time Campaign:** We are considering a recruitment campaign for Part Timers. We plan to pay them a base wage less than the Over Time Premium. In our plan we will require that they are already full time employees – from companies ***other than*** security firms and existing clients. If they are full time workers, the Background investigation will be easy to conduct and will expedite and assist the determination process of hiring qualified "part-timers". We plan to run a test with no obligation for the Sunday. The minimum qualifications are – good standing with current employer for at least 3 years. Can work no more than 16 hours a week and no more than 8 hours per shift for Wackenhut. Must pass all required tests and background investigations. We plan to hire a small pool at first of 10, as Part Time at an attractive wage of $6.50 which is still less than the $7.72 overtime wage we pay for our full time employees contracted at minimum wage ($5.15). I had a meeting with HR, Operations and Training today to discuss the pros and cons of this program. I will keep you posted on the progress. Of course we will also have the operational

controls in place to assure these partimers [sic] are assigned only when "unscheduled O.T. hits operations. They will not be able to work more than 8 hours per shift and they will not be able to work more the two shifts per week. our background checks will be base [sic] on their current employment reference. If you see any problems in implementing this program, please let me know as we are preparing for Easter Weekend, which will hit us hard if we don't have these partimers [sic] in place.

9. **Inventory Program:** Currently we do not have an active inventory program for Alarm or supply. It is difficult to determine when and where the uniforms, and electronics equipment are entering and leaving the company. We are in the process of standardizing an inventory program to help control this.

10. **Alarms Division:** We are defining a standard bid and Contract process for the alarms division. I have not been able to conduct a full marketing analysis for alarm monitoring. However, based on the information Luis Zapata (Manager Alarms division) states, TYCO, Ranger American, ALARMEX and USA LINK are the biggest alarm monitoring companies here in Puerto Rico. Safe Home will be entering the market here in Puerto Rico in April. These companies are in price wars and are now offering Free Alarm System and Installation based on a contract of 2 years at 34.95 per month.

Wackenhut Puerto Rico offers a system and installation for $199 with a monitoring subscription contract of $14.95 per month for at least one year.

To become more competitive in the market, we would like to offer the alarm system and installation free, as the competitors and charge a monthly subscription of $31.95 for at lease 24 months. Of course our exposure will be the

investment and installation of the alarm system and the collections.

To control the collections process, Wackenhut Puerto Rico's alarms contract would be signed, contingent upon the customers enrollment of Direct Billing to either their checking account or credit card. This feature would enable automatic payment and would reduce the invoicing problems we are currently facing (billing customers that are inactive, and not billing customers that are active). Additionally, with the new software we are proposing for 2003,

- Current Monitoring System
- Central Station "Linear"
- Capacity of 999 lines
- Analog
- Multi User module has capacity of only 10. We have several clients with more than 10 users
- Zoning capacity has a limit of 10 zones. We have clients with more than 10 zones
- Receives only 10 types of signal formats
- Does not have ADEMCO contact ID (needed for all control panels now being sold for Multi-User customers
- Does not receive addressable Fire equipment
- PC is an old P54C with 32 mg of RAM
- We cannot do a back ups [sic] on it through the ZIP Drive, reason unknown. If we have computer system failure, we will be in trouble.

- Does not support remote access/programming (connect and disconnect service, program customer's alarm panel.
- To print reports, the system monitoring is placed on hold until the report is completed and all alarms are cued until the report is completed.

Problems – the monitoring station:

We have no back up system for the Central Station

It is a model 10 years old and there is no repair service or parts in stock in the event of a system failure.Without a backup system we are extremely vulnerable and are exposed to legal issues in the event the system fails and an alarm is activated and we do not make the appropriate response in accordance with contract.

Solution

Replace the current Central Station with an updated model (SURGUARD SLR/MLR2/MLR2000) $4000. The system is digital, and has the capability to use contact ID which enables the support of unlimited users and unlimited zones. It also reads all signal formats.

Use the current Central Station as a preliminary back up until we are able to purchase another SURGUARD for $4000 (6-8 months)

The new Central Station will require a new computer which will cost another $1000

Installation and training will cost another $3,500-$4,000

Total cost for new system for 2002

Central Station	$4,000
New PC	$1,000
Conversion	$500
Total for 2002	$5,500

In 2003 we will want to purchase:

Back Up Central Station	$4,000
Windows Based Software	$4,000
Training/Support	$2,000
Total for 2003	$10,000
Total for system 2002-2003	**$15,500**

During 2001 revenues from Alarms Division which includes monitoring, installations and maintenance (collected) was $240,000. To be conservative, I believe we will continue the same level of collected revenue for 2002 and 2003. At this point in time, I have not been able to accurately calculate the costs of running the alarm division due to the lack of inventory information.

	Current (March 1, 2002)					Proposed (April 1, 2002)				
	Title/ Position	Name	Annual Salary	No. Pers.	% of Total $	Title/ Position	Name	Annual Salary	No. Pers.	% of Total
					General Manager					
1	General Manager	Aurelio Rosado	$150,483	1	17.08%	General Manager	Aurelo Rosado	$150,483	1	19.12%
2	Secretary	Mary Ann Bloom	$16,640	1	1.89%	Secretary/ Proposal Writer	Astrid Massa	$16,640	1	2.11%
	Subtotal		$167,103	2	18.97%	Subtotal		$167,103	2	21.23%
					Business Development					
3	BD Rep	Luis Geraldo	$24,000	1	2.72%	BD Rep	Luis Geraldo	$24,000	1	3.05%
4	BD Proposal Writer	Astrid Massa	$16,640	1	1.89%	Position Split – Moved to position # 2				
	Subtotal		$40,640	2	4.81%	Subtotal		$24,000	1	3.05%
					Human Resources					
5	HR Manager	Victor Carmona	$33,000	1	3.75%	HR Manager	Victor Carmona	$33,000	1	3.75%
6	Trainer	Jorge Calderon	$27,117	1	3.08%	Moved to #28 O/C-Training				
7	HR Secretary	Ycando Montes	$14,498	1	1.05%	Position Change to COO #26				
8	HR Investigations	Luz Carrillo	$11,762	1	1.34%	HR Investigations/ Interviewer	Luz Carrillo	$11,762	1	1.34%
9	HR Data Entry Clerk	Grisell Melendez	$13,208	1	1.50%	HR Asst Interview/ Data Entry Clerk	Grisell Melendez	$13,208	1	1.50%
10	HR Clerk	Brunildo Cruz	$12,522	1	1.42%	HR Clerk	Brunildo Cruz	$12,522	1	1.42%
11	HR Warehouse Clerk	Pedro Medina	$11,960	1	1.38%	Shift to Accounting Position #				
12	HR Switchboard Operator	Lillbeth Diaz	$11,440	1	1.30%	Position Change to COO #26				
13	HR Benefits Specialist	Ademina Roman	$20,405	1	2.32%	HR Benefits Specialist	Ademina Roman	$20,405	1	2.32%
	Subtotal		$155,912	9	17.70%	Subtotal		$90,897	5	11.55%
					Electronics					
14	Electronics Manager	Luis Zapata	$50,358	1	5.72%	Electronics Manager	Luis Zapata	$50,358	1	5.72%
15	Electronics Secretary	Leida Esteva	$14,560	1	1.65%	Electronics/ General Secretary	Leida Esteva	$14,560	1	1.65%
16	Electronics Tech	Reinaldo Claudio	$15,080	1	1.71%	Electronics Tech	Reinaldo Claudio	$15,080	1	1.71%
17	Electronics Tech	Jose Guinones	$11,440	1	1.30%	Electronics Tech	Jose Guinones	$11,440	1	1.30%
18	Electronics Tech	TBA	$10,920	1	1.24%	Electronics Tech	TBA	$10,920	1	1.24%
	Subtotal		$102,358	5	11.62%	Subtotal		$102,358	5	13.01%

				Accounting						
19	General Accountant	Carlos Reyes	$24,960	1	2.83%	General Accountant	Carlos Reyes	$24,960	1	2.83%
20	Accountants Payable	Jose Soijo	$20,904	1	2.37%	Accountants Payable	Jose Soijo	$20,904	1	2.37%
21	Collections Supv	Isabel Cotto	$19,760	1	2.24%	Collections Supv	Isabel Cotto	$19,760	1	2.24%
22	Collections Clerk	Maria Medrano	$15,600	1	1.77%	Collections Clerk	Maria Medrano	$15,600	1	1.77%
23	Accounting Assurance	Joel Mangual	$17,659	1	2.00%	Accounting Assurance	Accounting Assurance	$17,659	1	2.00%
24	Accounting Assurance Asst.	Amaldo Garcia	$13,520	1	1.53%	Accounting Assurance Asst.	Eliminate Position			
25						Warehours/ Inventory/ Messenger	Pedro Medina	$11,960	1	1.38%
	Subtotal		$112,403	6	12.78%	Subtotal		$110,843	6	14.08%
				Operations						
26	Operations Manager	Victor Monzon	$30,576	1	3.47%	National Ops Manager		$30,576	1	3.47%
							2 CCOs transferred to billable jobs. They will be replaced with positions # and #			
27	Command Center		$58,120	4	6.60%	Command Center		$80,000	4	6.81%
28	Mechanic		$13,915	1	1.58%	Mechanic	Position Eliminated			
29						O/C trainer	Jorge Calderon	$27,117	1	3.08%
30	Area Manager Cag/Metro	Hector Rodriguez	$19,000	1	2.16%	Area Manager North East 1	Amaldo Garcia	$15,000	1	1.70%
31						Area Manager North East 2	Pedro Garcia	$19,000	1	2.16%
32	Field Supv Cag/Metro	Pedro Rodriguez	$13,000	1	1.48%	Field Supv North East 1	Pedro Rodriguez	$13,000	1	1.48%
33	CPO Cag/Metro	Antonio Crespo	$8,240	1	0.71%	Field Supv North East 2	Antonio Crespo	$12,480	1	1.42%
34	CPO Cag/Metro	Pedro Ithier	$12,480	1	1.42%	Field Supv North East 3	Pedro Ithier	$12,480	1	1.42%
35	CPO Cag/Metro	Miguel de Leon	$12,480	1	1.42%	Field Supv North East 4	Miguel de Leon	$12,480	1	1.42%
36	Area Manager Bay/Are	Ramon Garcia	$19,000	1	2.16%	Area Manager Bay/Are	Shifted to #32			
37	Field Supv (Bay/Are)	Horacio Pocimiro	$13,000	1	1.48%	Field Supv (Bay/Are)	Eliminate Position	$2,080		
38	Field Supv (Bay/Are)	Antonio Crespo	$8,240	1	0.71%	Field Supv (Bay/Are)	Eliminate Position			
39	Field Supv (Bay/Are)	Pedro Maysonet	$13,520	1	1.53%	Field Supv (Bay/Are)	Eliminate Position	$2,600		
40	Area Manager Pon/May	Efmin Aisina	$23,587	1	2.68%	Area Manager Pon/May	Efmin Aisina	$23,587	1	2.68%
41	Captain (Pon/May)	Luis Malave	$12,480	1	1.42%	Captain (Pon/May)	Luis Malave	$12,480	1	1.42%
42	Supervisor (Pon/May)	Santiago Reyes	$12,480	1	1.42%	Supervisor (Pon/May)	Santiago Reyes	$12,480	1	1.42%
43	Field Supv (Pon/May)	Jusino Vargas	$6,000	1	0.68%	Field Supv (Pon/May)	Jusino Vargas	$6,000	1	0.68%
44	Field Supv (Pon/May)	Mercado Rodriguez	$9,152	1	1.04%	Field Supv (Pon/May)	Mercado Rodriguez	$9,152	1	1.04%
45	Field Supv (Pon/May)	Perez Supelveda	$9,152	1	1.04%	Field Supv (Pon/May)	Perez Supelveda	$9,152	1	1.04%
46	Field Supv (Pon/May)	Jose Rodriguez	$9,152	1	1.04%	Field Supv (Pon/May)	Jose Rodriguez	$9,152	1	1.04%
47	Field Supv (May)	Ramon Ruiz	$3,000	1	0.34%	Field Supv (May)	Ramon Ruiz	$3,000	1	0.34%
	Subtotal		**$302,574**	**23**	**34.34%**	**Subtotal**		**$291,815**	**20**	**37.09%**
	Total Wackenhut PTR		**$881,038**	**47**	**100.00%**	**Total Wackenhut PTR**		**$787,057**	**38**	**100.00%**

Total Current	$881.030	47
Total Proposed	$787,057	39
Total OH Reduction in Salaries and Wages	$93,973	8
Total OH Reduction in FICA FUI SUI VAC Sick Leave	$15,994	
Total OH Reduction	$109,967	
Total Reduction in $ (%)	10.67%	
Total Reduction Personell (%)	17.02%	

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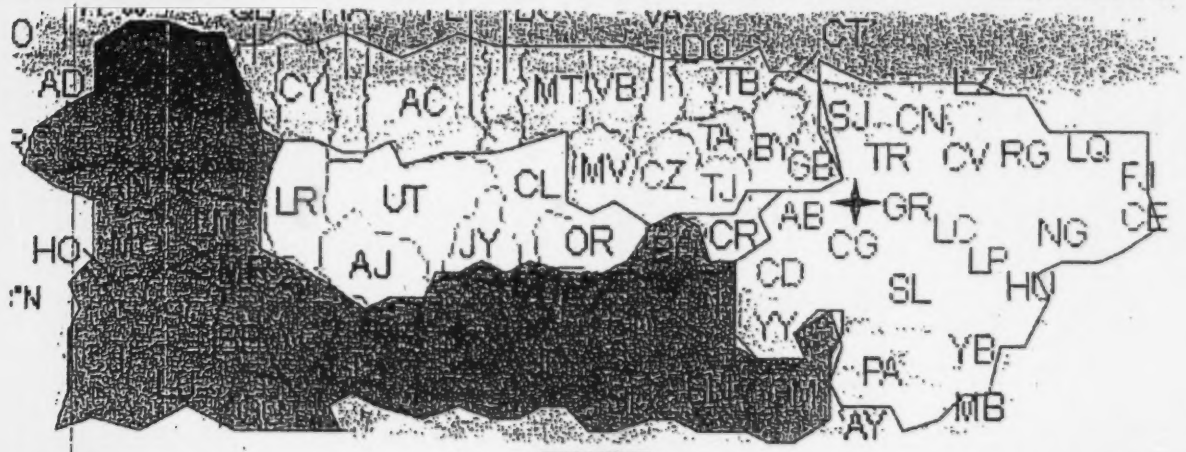
WACKENHUT PUERTO RICO- CURRENT REGIONS



PONCE/MAYAGUEZ

PONCE		
Weekly Hours	3930	
Unshceduled OT	58	1.48%
MAYAGUEZ		
Weekly Hours	480	
Unshceduled OT	12	2.50%
Region Total	4410	1.59%
Overhead Staff (wkly)	8	$1,595

BAYAMON/ARECIBO

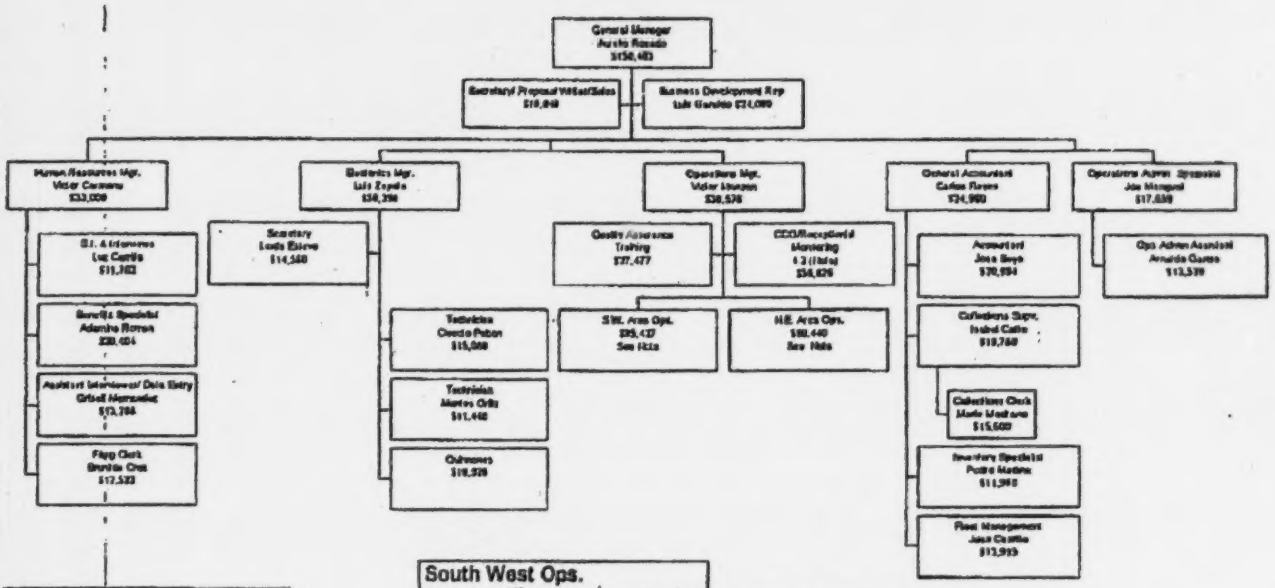
BAYAMON		
Weekly Hours	2040	
Unshceduled OT	77	3.77%
ARECIBO		
Weekly Hours	2904	
Unshceduled OT	101	3.48%
Region Total	4944	3.60%
Overhead Staff (wkly)	4	$1,125

CAGUAS/CAROLINA

San Juan		
Weekly Hours	5922	
Unshceduled OT	483	8.16%
Caguas		
Weekly Hours	2027	
Unshceduled OT	183	9.03%
Region Total	7949	8.38%
Overhead Staff (wkly)	32	$12,406

Puerto Rico Totals		
Weekly Hours	17303	
Unscheduled OT	914	5.28%
Overhead Staff	44	
Weekly OH Wages	$15,127	

WACKENHUT PUERTO RICO
PROPOSED (1 APRIL, 2002)



CCO Post	
Yolanda Montes	$14,496
Lilibeth Diaz	$11,440
Eli de Jesus	$14,040
Nieves	$14,040
Relief Factor	$2,808
Automated Switchboard	
Total CCO	$56,826

South West Ops.	
Area Manager S.W	$23,587
Asst. Area Manager	$19,000
Area Supv. S.W	$12,480
Area Supv. S.W	$12,480
CPO Non-Billable	$2,500
CPO Non-Billable	$2,500
Area Supv. S.W	$11,440
Area Supv. S.W	$11,440
Total S.W.	$95,427

North East Ops	
Area Manager N.E	$19,000
Asst. Area Manager	$15,000
Area Supv. N.E.	$19,000
Area Supv. N.E.	$13,000
Area Supv. N.E.	$13,000
Area Supv. N.E.	$11,440
Total N.E.	$90,440

Total Proposed in Annual Salaries = $787,057
Total Proposed Personnel = 39